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CASE INTERPRETATION

SHAWN J. BAYERN*

ABSTRACT

This Article develops an approach to constructing the meaning of prior court cases that is more helpful than formalistic, conventional distinctions between concepts like “holdings” and “dicta.” Instead of trying to classify judicial announcements into fixed categories, courts should engage in a broader interpretive inquiry when confronting prior cases. Determining what a judicial opinion stands for requires determining the intent that motivated the opinion, as carefully understood in light of the factual and argumentative context that gave rise to it.

Under this view of precedent, binding common law arises in large part from principles explicated after considering facts. Viewing precedent in this way indicates a generally unrecognized danger from fact-unbound precedents—that is, legal rulings by courts that cannot sensibly be tied to the facts of particular cases. Such unbound precedents arise chiefly in the context of statutory interpretation. This Article suggests several solutions to this problem, including a statutory-interpretation-avoidance maxim and a novel proposal that courts should not consider themselves obliged in all cases to answer the legal questions that underlie parties’ disputes.

I. INTRODUCTION	126
II. PRECEDENT AS CONSTRUCTION OF INTENT	128
A. Alternate Interpretive Approaches	128
1. Minimalism	128
2. Result-Oriented	131
3. Judicial Announcements of the Law	132
B. Precedent as Interpretation	132
1. The Role of Interpretation	132
2. A Continuum of Authority	138
C. A Plausible View	143
D. Normative Considerations	146
1. Judicial Restraint and the Separation of Powers	147
(a) Power and Dicta	147
(b) Constitutional Limitations	151
2. Foresight and Care	155
3. Judicial Economy and Generativity	160
(a) Management of Lower Courts	160
(b) Generation of Rules	163
4. Clarity, Honesty, and Administrability	164

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III. FACT-BOUND AND FACT-UNBOUND PRECEDENTS	167
A. <i>The Importance of Facts in the Common Law</i>	168
1. <i>Fact-Bound Expansion and Narrowing of Judicial Announcements</i> .	168
2. <i>Facts and Statutory Interpretation</i>	169
B. <i>Reducing the Impact of Fact-Unbound Precedents</i>	171
1. <i>A Maxim to Avoid Unnecessary Statutory Interpretation (in Fact-Unbound Cases)</i>	171
2. <i>A Refusal to Decide Questions of Law</i>	172
IV. CONCLUSION	174

I. INTRODUCTION

A feature of court opinions is so obvious that it is rarely stated: opinions are textual documents, and like statutes and contracts, they have a purpose and a particular factual context. Determining what a court opinion means—that is, what law it helps create—is essentially a matter of *case interpretation*, analogous in many ways to statutory interpretation or contract interpretation. Courts and commentators have developed terminology and concepts like “holding” and “dictum” that guide our interpretation of judicial documents. But like many concepts, these guidelines can obscure the problem at hand if they are followed too formalistically. Fundamentally, a court’s endeavor in interpreting cases is broader than this terminology and the surrounding doctrines suggest. Others have recognized this,¹ but for whatever reasons the recognition always fades, and more formalist views come again to limit both our understanding of prior cases and our imagination about what options courts have in deciding new ones.

This Article explores several issues related to case interpretation. It first sets out to develop a simple, though in some ways novel, theory of precedent that serves as a better guide to interpreting cases than do the still-conventional notions of *holding*, *dictum*, and *ratio decidendi*. In short, cases should be taken to stand for what they were intended to stand for, as carefully interpreted in view of the knowledge that they were produced in a limited factual and argumentative context. Just like statutes, contracts, and other written documents that have legal effects, opinions have an intent, and determining the meaning of a case requires a determination of this intent. Under the view I set out, a statement in an opinion is not necessarily or exclusively either holding or dictum; any statement can serve as precedent for future cases given the right factual and argumentative context. To put this differently, courts are not formally or

1. See, e.g., MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 52-55 (1988); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 103 (1996) (“[A] ruling no longer needs the credentials of a ‘holding’ in order to be available for unqualified reliance and use.”).

practically limited to classifying a statement as holding or dictum in the abstract.

Having developed this view of precedent, this Article next considers several questions in its light. Most significantly, it attempts to show that there are common but widely unperceived dangers not from dicta but from *fact-unbound precedents*—that is, judicial announcements of legal decisions that have little to do with the factual context that gave rise to them. This is a danger even if the pronouncement was a “holding” or was logically necessary to resolve a question that was before a court. Some classes of issues, including many ordinary questions of statutory interpretation, lend themselves to this sort of fact-unbound decision. This Article describes the danger of fact-unbound decisions and sets forth a few potential solutions. Some of these solutions may seem like radical changes to the way courts function; for instance, I believe courts appropriately have less of a duty than they think they do to provide definitive resolutions to legal questions that the parties before them have raised. But, there are also some relatively mundane solutions that will go a long way to reduce the generation and impact of bad law.

Part II spells out my view of precedent and contrasts it with alternative views. Note that I am not aiming to address questions concerning the appropriate *strength* of precedent—for instance, when courts should overrule it or what the precise relationship between higher courts and lower courts should be.² I also do not mean to suggest that courts are limited to the intent of prior cases in developing law. Instead, my goal is to describe how courts should, and for the most part do, interpret prior court opinions and figure out what they stand for.³ This activity is much broader and less formalistic than those trained to look for holdings and dicta tend to imagine.

2. I do, however, think that it makes sense to talk of precedent even though it can be overruled. Edward Levi appears to have disagreed. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949) (“Where case law is considered, and there is no statute, [a judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.” (footnote omitted)).

In any event, the goal of this Article is not to develop rules about stare decisis generally; it is instead to develop part of the basis for determining the legal pronouncements that such rules would require courts to follow. Accordingly, this Article’s analysis applies generally to interpreting cases, whether they are higher-court cases that a lower court feels absolutely bound by or coordinate-court cases that later courts believe themselves situated to overrule or modify. For related terminological clarifications, see *infra* note 24.

3. As others have noted, this area has suffered lately from a lack of attention from courts and commentators. Many scholars aim to characterize the strength of precedent and the conditions under which it should be overruled, but relatively few have attempted to characterize what court cases actually *mean*. See Michael Abramowicz & Maxwell Stearns,

Part III introduces and addresses the notion of fact-unbound precedents, outlines their danger, and suggests several potential responses. Broadly speaking, courts can minimize the danger of fact-unbound decisions in two ways. First, just as they attempt to avoid deciding constitutional questions when it is not necessary to do so, courts should resolve fact-bound issues before resolving fact-unbound ones. Second, courts should not imagine that they are required to provide definitive answers to legal questions that parties raise. It is, in many cases, more desirable for courts to say to a party, "You have not convinced us that your legal argument is correct," than to decide the underlying issue one way or another.

Part IV concludes briefly.

II. PRECEDENT AS CONSTRUCTION OF INTENT

A. *Alternate Interpretive Approaches*

Consider a somewhat schematic generalization of a court opinion that reads as follows:

The facts are *A*, *B*, *C*, and *D*. Regardless of other facts, given *A* and *B* alone, it is clear that the plaintiffs have established that they are entitled to relief. Given *C* and *D* alone, too, it is just as clear. Indeed, the plaintiffs would carry their burden even if *E*, *F*, *G*, and *H* were true instead of *A*, *B*, *C*, and *D*. The case is an easy one, and we caution the defendant that its defense, while perhaps impressively aggressive in some circles, overreached in many ways and that we might have even considered imposing sanctions on the defense lawyers had they been requested by the plaintiff. We find most of the defendant's arguments vacuous.

1. *Minimalism*

What are we to do with the various statements in this opinion? There is no shortage of proposals, and yet in most cases they miss the mark. Perhaps the most familiar approach, defended recently by Judge Pierre Leval,⁴ is what Mel Eisenberg has called the "minimalist approach."⁵ This technique would have us identify the *holdings* that are in some sense necessary for the opinion and separate them

Defining Dicta, 57 STAN. L. REV. 953, 957-58 (2005) ("Despite the growing need . . . in recent decades the literature on the distinction between holding and dicta has been tiny in comparison to the broad literature on stare decisis." (citation omitted)). Abramowicz and Stearns are concerned specifically with the distinction between holdings and dicta and aim to refine that distinction, but the general problem they address is the same as mine: what statements should be interpreted as precedent?

4. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1268 (2006).

5. EISENBERG, *supra* note 1, at 52-55.

from the *dicta*, which are not.⁶ We would then imagine that the holdings establish precedent and that the *dicta* are no more relevant than academic commentary in setting forth the law.

What are the holdings and *dicta* in our example? As has long been recognized, it is not so easy to determine,⁷ and there is remarkable confusion on the subject. At times it is treated as a deep mystery; thus, a former chief justice of Australia has referred to “the arcane mysteries of divining the *ratio* [*decidendi*]”⁸—that is, the supposedly binding part of a case’s holding—and Joseph Raz to the “mystical view of the identification of the *ratio* as a great occult art of tremendous difficulty.”⁹ Even recently, the conceived difficulty of the task has motivated new elaborations on the definitions of relevant terms.¹⁰

Despite the difficulty, however, some broad contours have always been clear. The principal feature of holdings is that they are necessary to decide a case, and the principal feature of *dicta* is that they are not.¹¹ Clearly the chiding of the defendants in our example is dictum.¹² So too is the court’s prediction that it would decide the case the same way on different facts. Of course, just to be difficult, I’ve constructed the example in such a way that there are two holdings, neither of which is logically *necessary* to reach the court’s decision: like a circuit in parallel, there are two redundant paths the court uses to reach its decision, and eliminating one still leaves the other. (In my example, the court holds that the plaintiff wins because of facts *A* and *B* and also, independently, that *C* and *D* compel the same result.) Thus, neither is necessary, but to decide the case we need at least one of them. This is not an insurmountable problem for the mi-

6. Dictum, the singular form of *dicta*, is Latin for “saying” or “utterance.” In the legal context, dictum is a shortening of the phrase *obiter dictum*, meaning roughly “something said by the way”—that is, something said in passing. 4 THE OXFORD ENGLISH DICTIONARY 626 (2d ed. 1989); 10 *id.* at 639.

7. See, e.g., JOHN BOUVIER, *BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* 863 (5th ed. 1914) (“It is not easy to define the term [dictum] with such precision as to afford an exact criterion by which to decide when the language of a court or judge is entitled to be considered as a precedent and followed as an authority.”).

8. Sir Anthony Mason, *The Use and Abuse of Precedent*, 4 AUSTL. B. REV. 93, 103 (1988).

9. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 188 (1983).

10. See, e.g., Abramowicz & Stearns, *supra* note 3, at 1065-75.

11. See EISENBERG, *supra* note 1, at 52.

12. Cf. David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 740 (2007) (concluding that warnings about future sanctions should be imposed only against a “frequently-asserted argument in an often litigated area of law”). Given the analysis in Part II.D, *infra*, however, there appears to be no reason *ex ante* to limit warnings about sanctions to any particular, prespecified group of cases. Indeed, given a choice between warnings and no warnings about sanctions that a court predicts are probable, courts and litigants would both presumably prefer warnings.

nimalist view,¹³ but it does demonstrate that courts can sometimes choose the subjects of their holdings.¹⁴ The court in this situation easily could have said "We reach our decision given *A* and *B* alone" or "We reach our decision given *C* and *D* alone," and either path would be a holding even to interpreters concerned only with what was literally necessary to reach the court's decision. In practice, as it stands, both prongs of this sort of parallel holding tend to be treated as holdings rather than dicta.¹⁵

13. *But cf.* Leval, *supra* note 4, at 1258 n.23 (suggesting that parallel—or alternative—holdings raise for him the same dangers as dicta because "[c]ourts often give less careful attention to propositions uttered in support of unnecessary alternative holdings").

14. *Cf.* LLEWELLYN, *supra* note 1, at 306-09 (suggesting that it may sometimes be useful for courts to provide alternative holdings *deliberately*).

15. *See, e.g.,* *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case *obiter dictum*, because it is only one of two reasons for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than section 3477, but we cannot hold that the use of the section in the opinion is not to be regarded as authority, except by directly reversing the decision in that case on that point, which we do not wish to do.").

It is interesting to note that this traditional rule appears to be justified largely by prudential considerations like judicial economy and the likelihood that issues have been "fully argued" before a court (whatever that means) rather than by formal distinctions. That is, what is essentially an incompleteness in the statement of a formal distinction between holdings and dicta seems to be addressed not by an attempt to correct the incompleteness, but by a more general principle that seems to undermine the formalism. *See, e.g.,* *R.R. Cos. v. Schutte*, 103 U.S. 118, 143 (1880) ("It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.").

For an example of this principle applied in the federal circuit courts, see *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991), which stated that "alternative holdings are binding precedent and not *obiter dictum*." *Pruitt's* statement of this rule appears to rest largely on a broader Fifth Circuit practice of recognizing as holdings judicial responses to "issues which are fully presented and litigated." *See, e.g.,* *United States v. Adamson*, 665 F.2d 649, 656 n.19 (5th Cir. 1982) ("Although not necessary to its narrow decision to reverse, the court proceeded to address and reject [a] challenge It is common practice for an appellate court to consider and decide issues which are fully presented and litigated and which will likely arise on retrial, even though such decision may not be necessary to support the narrow decision to reverse. The practice serves an important interest in judicial economy. In this broader sense, we conclude that the [prior] panel's decision . . . was necessary to the proper disposition of that case. Moreover, we note that had the [prior] panel reached the contrary result on [an initial question], the decision would have been [an] alternative holding supporting the reversal, and thus binding on subsequent panels. We would find it somewhat anomalous to say that a decision in one direction would be holding but a decision on the same issue and under the same circumstances in the other direction would be dictum." (citations omitted)).

The analytical situation is broadly similar for the case of *prospective overruling*—the ability of a court to state one rule that applies to the case in front of it and a separate rule that applies to future cases. Technically the statement of the new rule is not necessary to the case in front of the court, and yet it is an odd result that classifies it as not a statement of law. As Dean Keeton put it, "the new rule could have been dispositive of the litigation

A few recent articles have tried to elaborate the minimalist account of precedent by refining the distinction between holdings and dicta. Judge Leval has suggested that dictum is any statement that, if its opposite were instead stated, would have no effect on the court's reasoning or judgment.¹⁶ Michael Abramowicz and Maxwell Stearns have spelled out an alternative formulation, under which holdings are roughly any statements that are actually decided and lead to or support a judgment.¹⁷ They phrase their definition as follows: "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment."¹⁸ As I respond to the minimalist view, I use these two recent approaches as my chief examples, but most of what I say is applicable to variations of these particular definitions of holdings and dicta.

2. Result-Orientation

An alternative approach, one that I believe is taught less widely to students today,¹⁹ is that the precedent of an opinion is simply its outcome: on certain facts, a particular result was reached.²⁰ The court, like a patient in therapy who fails to understand his or her own psyche, attempts in its opinion to describe what motivates it, but in interpreting the court's actions we do not assume that the court actually knew what it was doing. Instead, we pretend that the court knows how to reach right results, but as a so-called black box; opinions are useful as guides, but as statements of the law they are essentially irrelevant except to the extent they state relevant facts and then, in capitalized or italic letters, "reverse," "remand," "affirm," or "order." Applying this approach to our sample opinion, all we know is that on facts *A*, *B*, *C*, and *D*, the court decided for the plaintiffs; nothing else is precedent.²¹ New cases would, to the extent they aim to fol-

and was fully considered by the court." ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 33 (1969).

16. Leval, *supra* note 4, at 1257 ("To identify dictum, it is useful to turn the questioned proposition around to assert its opposite, or to assert whatever alternative proposition the court rejected in its favor. If the insertion of the rejected proposition into the court's reasoning, in place of the one adopted, would not require a change in either the court's judgment or the reasoning that supports it, then the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment.").

17. Abramowicz & Stearns, *supra* note 3, at 1065.

18. *Id.*

19. It does, however, seem to appear in at least one prominent teaching text on legal research. See MORRIS L. COHEN ET AL., *HOW TO FIND THE LAW* 16 (9th ed. 1989) ("The holding is limited to the decision and the significant or material facts upon which the court necessarily relied in arriving at its determination. Everything else is dicta and therefore not binding.").

20. See EISENBERG, *supra* note 1, at 52 (calling this the "result-centered approach").

21. In this sense, the result-centered approach is actually more minimal than the minimalist approach; the latter approach pays attention to the court's reasoning in reaching

low the precedent, be constrained to announce rules that, on facts *A* through *D*, led to a victory for the plaintiffs, but the court's reasoning is taken to be at best the court's struggle to find meaning for its intuitions in a chaotic and hard-to-describe world. To put it differently, we trust courts to get results right, but we do not trust what they say.

3. *Judicial Announcements of the Law*

Professor Eisenberg, in his book *The Nature of the Common Law*, sets forth a third alternative, and it is this one that I want to build upon in setting out my view of precedent. Calling it the "announcement approach," he describes it as follows: "[T]he rule of a precedent consists of the rule it states, provided that rule is relevant to the issues raised by the dispute before the court."²² In other words, we would be more honest and allow for more direct generation of legal rules if we simply believe what courts say they are doing.

Professor Eisenberg's description limits the binding precedent of an opinion to that which is "relevant to the issues raised by the dispute before the court."²³ One of my goals in this Article is to clarify what "relevant" ought to mean and, in so doing, to spell out a more complete version of the announcement approach.

B. *Precedent as Interpretation*

1. *The Role of Interpretation*

To set out a more complete understanding of precedent, I begin again with the basic observation that opinions are textual documents that have effect only to the extent they are interpreted.²⁴ They are

its result (and therefore acknowledges the result as a critical component of the holding), while the former pays attention only to the result.

22. EISENBERG, *supra* note 1, at 54-55.

23. *Id.* at 55.

24. There are some technical clarifications to my terminology that will make my argument clearer to those familiar with prior literature. In *The Nature of the Common Law*, Professor Eisenberg observes that to "speak of 'interpreting' a precedent" runs the danger of misstating what common-law courts do for two reasons. EISENBERG, *supra* note 1, at 51. First, courts can "reformulate or radically reconstruct the text," and the term *interpretation* makes the scope of their reasoning seem narrower. *Id.* at 51-52. Second, the meaning of precedent can change over time, in view of judicial and professional discourse on the topic, and so the original court's text is not the exclusive or even necessarily the primary source of meaning when applying precedent. *See id.* I do not disagree substantively with either of those observations; courts do not simply try to act as if they had the same intent as earlier courts, and longstanding precedent is indeed informed by experience with how it has been applied.

Nonetheless, I think there is value in analytically separating the interpretation of prior cases by which courts see themselves as bound in a precedential sense from both (1) courts' ability to distinguish, override, or modify prior courts' meaning or intent and (2) experience with the application of a precedent and evolving commentary on it. When I speak of precedent here, I speak specifically of the process of interpreting those pronouncements from prior courts that current courts see as setting "the law" in some sense. Once the in-

neither self-executing nor self-explanatory. Of course, I understand that this view of documents is sometimes controversial, that some commentators believe text usually has a single "obvious" meaning, and that we should set aside all questions about text's intent.²⁵ I be-

terpretation has been made, courts in suitable situations (e.g., courts of coordinate status to the court that issued the earlier pronouncement or lower courts empowered to predict the decision of higher courts rather than relying on those courts' explicit statements) can choose to overrule it or to decide that it should not govern a particular new case. Separately, a court, in determining what law applies to a case before it, may look at multiple sources, including multiple prior judicial opinions and commentary on the interpretation of those opinions. The overall harmonization of these sources (what Professor Eisenberg calls "establishing the rule of a precedent," *id.* at 52) may well demand a process broader than the interpretation of specific texts. My goal in this Article, however, is specifically to characterize the process of interpreting prior judicial texts. This process is typically at least a component of the determination of what prior law is, and it is this process that I am aiming to treat more fully.

By focusing on this specific interpretive process, I do not mean to diminish courts' use of sources other than prior judicial opinions, such as an evolving understanding of what the law means, as evidenced by professional and academic commentary. As an analogy, suppose the practice of statutory interpretation was said to follow rigid rules about constructing the text (as some might argue it does). In that case, an argument that statutory interpretation should be broader and more open-ended than the rigid rules suggested would not by itself undercut the argument that the interpretation of statutes should also be sensitive to social understandings of the statute, values that have changed since the statute has passed, and so on.

My terminology aligns the word "precedent" with the intent of an individual prior court. This means that courts often look beyond what I am calling precedent in deciding how the law has evolved. I believe this terminology corresponds with how most courts use the term, at least when they are applying it to individual cases before them.

In clarifying this terminology, there is also a substantive wrinkle. Raz argued that while it may often be true that later courts that modify earlier courts' rules are simply following what the earlier courts had meant to say but had failed to articulate appropriately, "this is not always so and often there is no evidence either way." RAZ, *supra* note 9, at 188. But to speak of a court's intent, we do not need any sort of *concrete* evidence of that intent, and we may acknowledge that others could reasonably disagree about what the intent actually was. In characterizing a court's modification of a previously announced rule, we simply need to know what process the court believed itself to be engaged in. If it believed it was following a rule that the prior court intended to state, then it believed it was following the prior court's precedent.

25. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25 (1997) ("Long live formalism. It is what makes a government a government of laws and not of men."). But despite widespread insistence that modern democracy needs to be founded on a "rule of law" rather than a rule by people, the dichotomy is in many ways artificial. As historian (and nonlawyer) A. Whitney Griswold has elegantly put it, "Laws are made by men,"—by which he meant people—

interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself. This is true even of the common law. With its slow, seemingly automatic accumulation of precedent, it may look to laymen like a coral reef. The legal philosopher knows it to be a finely wrought cathedral.

A. Whitney Griswold, *The Basis of a Rule of Law*, in *LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL* 160, 161 (new enlarged ed. 1962). To argue that judges' interpretive discretion be narrowed because the rule of law requires it is a somewhat empty argument. Perhaps things will work out better in some cases if judges' discretion is cabined, but the

lieve this view is simply wrong,²⁶ but it is not my goal in this Article to argue against all forms of textualism or textual formalism. Instead, I wish only to note that while textualists may initially be skeptical of my introduction of questions of intent into the process of interpreting court cases, doing so raises far fewer potential controversies than it does in the context of interpreting statutes.

There are several reasons for this difference. First, even those who aim to constrain the role of judges in interpreting prior cases speak of constructing the judges' "reasoning,"²⁷ and it is hard to know how to analyze a court's reasoning in reaching its decision without incorporating at least some notion of the court's intent in doing so. To put this observation differently, it may be that commentators simply do not tend to argue that courts' intents are irrelevant in the same way they argue that legislatures' intents are irrelevant.²⁸ This is probably because court opinions are discursive and because they ordinarily aim to demonstrate how a decision was reached. Opinions accordingly express an intent—or at least a thought process in support of a conclusion—more directly than a typical statute does. Judges writing opinions usually aim to spell out their thought processes in as much detail as they think is necessary.

Second, for similar reasons, judicial intent is likely to be much easier to determine than legislative intent, and it raises fewer conceptual and practical problems than does determining the intent of a legislature.²⁹ Not only are opinions discursive, but they are also usually composed by individual, identified judges.³⁰ Even when they

argument should be put in those terms rather than as an appeal to law, as if the nature of law decides the question one way or the other.

26. Cf. Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649-50 (2005).

27. See, e.g., Abramowicz & Stearns, *supra* note 3, at 961; Leval, *supra* note 4, at 1256.

28. See SCALIA, *supra* note 25, at 17.

29. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326 ("It is hard enough to work out a theory for ascertaining the 'intent' of individuals in tort and criminal law. To talk about the 'intent' of the legislature, as that term is normally used, multiplies these difficulties, because we must ascribe an intention not only to individuals, but to a sizeable group of individuals—indeed, to two different groups of people (the House and the Senate) whose views we only know from the historical record."). See generally McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS. 3, Winter & Spring 1994, at 3. ("McNollgast" is itself a collection of three commentators. Compare the ease of determining the intent of a discursive law review article written by three collaborating professors to that of determining the intent of a legislature.) I am not as skeptical as many commentators that groups often have intents that can usefully be inferred and described; my point is just that whatever the problems, they are likely to be less serious for courts than for legislatures.

30. This is not necessarily desirable, but it is currently a feature of American court opinions. For an argument that judges should not sign their names to their opinions, see James Markham, Note, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923

are not, they tend to be developed by groups much smaller (and likely more homogenous in terms of background and disposition) than legislatures. And in the case of courts, members of these groups ordinarily have the opportunity to write separately to express disagreement, to sign onto opinions only partially, and so forth.³¹

Third, separation-of-powers concerns tend to matter less when evaluating the role courts ought to play in evaluating other courts' writings than when evaluating how courts should approach legislative text. In giving one court broader scope to interpret another's intent, no (or at least not much) allocation of power between different branches of government is at stake. One argument for textualism in the context of statutory interpretation, moreover, is that legislatures pass textual laws, not intents, and courts must apply such laws.³² Regardless of the merits of this argument, it is harder to make it in the context of interpreting court opinions. Legislatures have the prerogative to obscure their intent or to insist that it does not matter. Courts, on the other hand, are ordinarily understood as being required to express reasons for what they do.³³

It is also systematically easier for courts to correct other courts than for a legislature to correct courts. Political and collective-action problems often make it difficult for a legislature to correct the errors courts make in interpreting statutes.³⁴ Courts face substantially fewer barriers in correcting themselves.

It is neither wrongheaded nor farfetched, therefore, for one court to develop a sense of what the author of a prior judicial opinion intended. But this does not mean that determining a court's intent is a trivial matter. Just as we face interpretive questions when considering other legal texts, such as constitutions, statutes, or contracts, we face problems in interpreting cases. The cases themselves do not act; they inform people, and people act.

In analyzing judicial texts, there are two sorts of interpretive problems that courts and commentators can face. The first type of problem is largely the same as those faced in interpreting statutes and contracts: what meaning do individual words and phrases convey? How should later courts respond to unclear expressions or even typographical errors? But because judicial opinions are discursive,

(2006). I am sympathetic to Markham's argument, but it is worth recognizing that at least the norm that opinions are *written* by a single judge may be a useful interpretive aid.

31. See generally Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995).

32. See SCALIA, *supra* note 25, at 16-17.

33. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 643-46 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (contrasting legislative and adjudicative processes).

34. See McNollgast, *supra* note 29, at 7; see also WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 65-73 (3d ed. 2001).

and because the context in which they are written is usually clearer than that for statutes and contracts, questions about this basic sort of meaning tend not to occupy much of courts' time, and they receive almost no attention in commentary about the way courts work.³⁵ Nonetheless, it is worthwhile to recognize that they may well exist. Thus, for example, we should not be surprised to see one court correcting another's careless mistake in a prior case rather than imagining artificially that the court must have meant something nonsensical.³⁶

The second kind of problem is considerably more general: the question is what rule the case's reasoning means to state—that is, what rule, standard, or principle the case was meant to stand for. It is this question that is ordinarily most prominent in establishing the precedent that an opinion creates. My central argument is that distinctions between holding and dicta amount to bright-line rules to answer this question formalistically and that, in so doing, they have led commentators to make certain unwarranted assumptions about what precedents can be and how they can function. In particular, any given statement in an opinion is assumed to be entirely precedential or entirely not. But in reality, as we shall see, courts often do (and should) take middle-ground positions: a particular phrase used by a court may partially but not entirely be precedent; a prior opinion's announcement about the strength of a legal argument might be binding to some extent without entailing a particular conclusion; and an announcement might be precedential for some cases but not for others.

35. Raz has even suggested that small textual ambiguities do not arise in court opinions. RAZ, *supra* note 9, at 188 ("Statutory interpretation turns sometimes on the employment of one word rather than another. Not so the interpretation of precedent."). I believe this overstates the matter, though it is indeed true that in interpreting opinions rather than statutes, individual words tend to matter less. But judges do occasionally parse and dwell on individual words in prior opinions. See, e.g., *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410, 412 (2006) ("It is not clear to us, however, that the District Court intended its opinion to rest on this ground. For one thing, the court used the word 'may.'"); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 140 (3d Cir. 2005) ("In all of our cases addressing this issue, we have held that the plaintiff's burden to rebut the presumption of laches is conjunctive. Not once have we used the word 'or.'"); *People v. Arias*, 913 P.2d 980, 1042 (Cal. 1996) ("[I]n another context, we used the word 'extreme' to narrow and clarify the meaning of a special circumstance which may render the defendant eligible for death.").

36. E.g., *Navajo Tribe v. United States*, 586 F.2d 192, 206 (Ct. Cl. 1978) ("The court in the volume 135 case quite obviously used the words 'continuing claim' when it meant the opposite. The phrase, as used in the cases cited in Judge Davis's footnote 17, means a claim that does not accrue all at once. It accrues by degrees, whenever a new money payment becomes due. But the court obviously meant by 'continuing claim' in the *Gila River* case one that did accrue all at once, the result obviously, of a single 'wrong.' This was in my view a mere verbal inadvertence that does not require overruling the decision as a precedent, but it should induce hesitation in using its language beyond the facts then before the court."); *State v. State Mut. Life Assurance Co. of Am.*, 353 S.W.2d 412, 413 n.1 (Tex. 1962) ("The court [below] surely meant *within* rather than *after*; otherwise there would be no limitation of time.").

My chief suggestion in trying to make sense of court opinions is that they stand for more or less what they say they stand for, *given the realization that they were developed in a particular context*, with limited facts and a limited viewpoint. I agree with Professor Eisenberg that a case's announced rule is typically precedent "provided that the rule is relevant to the issue raised by the dispute before the court,"³⁷ but we should not conclude from that description that a rule must be precedent or not in a binary sense (if relevant to the dispute it is precedent, and if irrelevant it is not). Instead, the precedential effect of a previously announced rule corresponds to what we infer the court intended to announce, given what we know about the limitations in the court's viewpoint arising from the factual context in which the disputed issues were raised before the court. The result is a view of precedent that, depending on context, might include a broader or narrower set of statements than one that would depend simply on the formal relevance of the announced rule to the facts before the court.

To put this differently, a court that announces a rule completely irrelevant to the issue before it has most likely not issued a binding precedent. But that is not the only question we need to ask about a court's opinion in deciding its precedential status. Typically, in determining precedent, we want to know whether, according to the rule of the precedent, a particular new case should be treated the same way as the prior court treated a related case. The way we should determine an answer to that question is to develop an inference about the opinion's intent. In developing that inference, we may need to look at several things: (1) what the court said; (2) the context in which the court said it; and (3) background knowledge, possessed by both us and the court, about such things as the court's role and its typical procedures.

For example, in analyzing the sample court opinion we started with, we should not look first at bright-line distinctions between "holding" and "dicta" or between "reasoning" and "results"—or even specifically at what is relevant to the dispute and what is not.³⁸ Instead, we should consider what the court said, treating it as precedent to the extent we believe it accurately reflects the court's intent to establish precedent, given the court's circumstances. In this case, we would imagine that everything the court said applies to new cases that it would have thought were relevantly similar to those in which facts *A*, *B*, *C*, and *D* or facts *E*, *F*, *G*, and *H* are true, unless we

37. EISENBERG, *supra* note 1, at 54-55.

38. If the court announced rules that were not at all relevant to the dispute before it, there may be reasons other than the interpretation of precedent that the court's pronouncements are not binding. See *infra* Part II.D.1.

have some reason to believe the new case presents a difference that the original court did not expect when it announced a rule governing these cases.

It is important to recognize that there are two distinct reasons a new fact pattern might not be covered by a previously announced rule: a new court can infer, from the opinion and its context, either (1) that the old court's explicit intent was for the new case not to be covered or (2) that the old court did not have the new case in mind when fashioning the announcement. If the new court makes either of those determinations, it has *distinguished* the new case from the old one. That is, differences between cases can convince a new court that the rule of an old case was simply not meant to cover the new one. In that case, the rule is not "precedent," as I use the term,³⁹ governing the new case. In common-law courts, differences between two cases can matter in another way: the differences might convince the new court that the old rule, while precedent, is unsound and ought to be overruled (if the court has the ability to do this).⁴⁰

2. *A Continuum of Authority*

Even for those statements that are clearly meant to govern the case that a new court is considering, the view I am setting out leads to a rich and adaptive approach to applying announcements from previous cases. A statement is typically not either "precedent" or "not precedent"; instead, it is precedent precisely to the extent context dictates.

As an example, start with the beginning of the sample opinion I gave earlier: "The facts are *A*, *B*, *C*, and *D*. Regardless of other facts, given *A* and *B* alone, it is clear that the plaintiffs have established that they are entitled to relief." The latter statement is not preceden-

39. See *supra* note 24.

40. Courts and commentators sometimes describe either of these processes as "distinguishing" a prior case from a new one, but I would limit that term to the first situation. In other words, I would say that it is the intent of an old opinion, as honestly construed by the later one, that allows later courts to distinguish the earlier opinion or not. If the differences suggest to the new court that the old rule is unsound despite the old rule's inclusion of the new facts within its ambit, I would say instead that the new court overrules the rule (in the new case and cases relevantly similar to it).

Note that following the precedent of an old opinion does not typically involve a wholesale substitution of an old court's intent for that of later courts. Determining precedent involves first figuring out whether the prior court would have intended the current case to fall under a particular announcement it made. If it did not, then that announcement is not precedent in the relevant case; it has been distinguished. Once a precedent is distinguished, the intent of the prior court is no longer authoritative.

Nothing I say in the text is meant to suggest that a common-law court must base a decision to overrule precedent on factual differences that arise. In the right circumstances, courts can also decide that old legal rules were wrong for other reasons. See generally EISENBERG, *supra* note 1, at 104-45 (treating overruling in depth).

tial by itself; it would be incorrect to imagine that, just because this statement was necessary or relevant to the court's final decision, a holding of this case is the following: "In all circumstances, no matter what else is true, *A* and *B* are sufficient for a victory for plaintiffs." The language from the case cannot simply be copied and pasted from Lexis or Westlaw into a new judicial opinion, even though it was relevant to the outcome of the first case.

Instead, the case was decided in a particular factual context; not only were *A* and *B* facts, but *C* and *D* were also facts. It may well be that given those facts, the addition of some unimagined fact *X* undermines the simplicity of the court's statement: if *X* were true, and this were in some sense unexpected and unaccounted for by the court, it may no longer be the case that even given facts *A* through *D*, *A* and *B* are sufficient by themselves for plaintiffs to establish their claim. But this does not undermine the court's statement any more than unexpected circumstances undermine a typical contractual or statutory pronouncement: what we learn from the court is that when *A*, *B*, *C*, and *D* are true, *A* and *B* alone dictate a decision for the plaintiffs *in cases the court could think of, given those facts*. "Regardless of other facts" does not mean "regardless of any facts," because the court almost certainly did not intend its announcement to mean that; instead, it meant something more like this: "In the cases we can imagine, having this one before us, we do not think that other facts would matter." To be clear, this means both (1) that even facts *C* and *D* are potentially relevant to the court's decision, even though the opinion says they do not figure into the explicit conditional proposition that forms the basis of the court's rule (if *A* and *B* are true, then plaintiffs state a claim), and (2) that the rule was not intended to cover unexpected facts not present or reasonably inferred.

I emphasize that I am not suggesting that the court had hypothetical factual variations explicitly in mind or that it had even a general sense of how all the facts before it influenced its decision. For the most part, in a typical opinion the court's own language will attempt to make clear what the court had in mind, but constructing what I am calling *intent* is not limited to particular active thoughts or mental states that we infer the judges on the court experienced. An interpreter of a case may well infer that, given the facts in front of it, a court made certain assumptions implicitly—that it *never* considered particular possibilities at all. Such "tacit" assumptions, as Lon Fuller called them, may be as influential as explicit assumptions:

Words like "intention," "assumption," "expectation" and "understanding" all seem to imply a conscious state involving an awareness of alternatives and a deliberate choice among them. It is, however, plain that there is a psychological state that can be described as a "tacit assumption", which does not involve a con-

sciousness of alternatives. The absent-minded professor stepping from his office into the hall as he reads a book “assumes” that the floor of the hall will be there to receive him. His conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not “occur” to him, that is, is not present in his conscious mental processes.⁴¹

Inferences about what a court has or has not considered might follow from things a court says; for example, it may be clear from the way an opinion is written that the court had implicitly made certain assumptions about the parties or the cases that might arise in the future. Inferences might also follow from background knowledge about the circumstances of the court; for instance, we might infer that a court tacitly assumed that there would not be broad shifts in social morality or far-reaching changes in technology.

This sort of reasoning applies to all the other pronouncements by the court in the sample opinion with which we started. Consider the next statement in our sample opinion: “Indeed, the plaintiffs would carry their burden even if *E*, *F*, *G*, and *H* were true instead of *A*, *B*, *C*, and *D*.” Here, the court is likely attempting to aid future litigants by suggesting that the precise details about *A*, *B*, *C*, and *D* are not important—at least to the extent that *E*, *F*, *G*, and *H* would dictate a similar result. The court has essentially said that the law does not differ between one set of facts (*A*, *B*, *C*, *D*) and another (*E*, *F*, *G*, *H*) on the question that the case raises. Note again that if circumstances vary widely from what the court expects, this conclusion might not be correct; on *E*, *F*, *G*, *H*, and *X*, for instance, the court may well decide differently than on *A*, *B*, *C*, *D*, and *X*. Also, there may of course be details of the features of fact *E* that the court did not expect, and it would be inappropriate to imagine that the court had thought through all these features.⁴²

To substitute for context, those who defend the minimalist view instead take the position that a line must be drawn between holdings and dicta. For instance, Judge Leval, in describing a scenario similar to the one I have just drawn out, writes about a case in which a court has said that a hypothetical new fact (which Leval calls *D*) would make a difference to its decision:

The court’s perception that the presence of *D* would change the result may turn out to be oversimplified. When faced with a concrete

41. LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 732-33 (8th ed. 2006).

42. That is, *E* might be a set that includes *E*₁, *E*₂, and *E*₃. The court may have been faced with *E*₁ and imagined *E*₂ to be similar but not have thought of *E*₃. There is no way to determine whether this is in fact the case or not except from context, though it is probably often the case that the court thought more concretely about variations in *A*, which was in front of it, than about variations in *E*, which was not.

dispute, the court may recognize important distinctions between *D* and *D'*. Perhaps the court will conclude that the result should change not in the presence of *D*, but rather in the presence of *D'*, something slightly different from the *D* it envisioned at the time of the earlier opinion.⁴³

So far, I agree with what Judge Leval has said. But from this, he concludes that a statement about *D* should not have precedential value:

I applaud the court's undertaking in dictum to warn that the presence of *D* is *likely* to change the result. But, in recognition of the heightened likelihood of mistakes when we speculate on hypothetical cases not before us, the court should make clear that this aspect of its discussion is dictum. It should not write in a manner that freezes the law with respect to facts the court has not yet confronted.⁴⁴

But such an extreme cutoff of the statement is not necessary. First of all, under my approach the court has *not* necessarily frozen the law concerning the distinction between *D* and *D'*, even putting aside the potential for later courts to overrule the announcement that *D* would change the result. This is because, depending on context, later courts might easily conclude that the prior court did not intend that *exactly* *D* would change the result, regardless of the formal or technical breadth of its literal statement about *D*. Depending on the facts and other features of the context, a later court may well determine that the court's earlier intent was actually about *D'*—or at least that its intent about *D* was considerably narrower than the literal force of the court's statement would suggest.⁴⁵ (To clarify this, suppose the court's original statement had been "Had *D* been present, we would have reached an opposite result." Suppose *D* is a set, and *D*₁, *D*₂, and *D*₃ are members of that set. In context, the protasis of the court's statement could easily have meant "Had some members of *D* been present," despite its literal breadth.)⁴⁶ Second, as I will explore more fully in Part II.D, the danger of the original court's carelessness or lack of imagination does not justify a formal or conceptualist approach in interpreting its announcements; if anything, it justifies the opposite.

43. Leval, *supra* note 4, at 1253 n.17.

44. *Id.*

45. *Cf.* *Haverstick v. S. Pac. Co.*, 37 P.2d 146, 152 (Cal. Ct. App. 1934) ("As we read [a prior case], relied upon by the appellant in support of its contention that the sections of the Codes . . . do not apply, we are forced to the conclusion that the facts in that case are so dissimilar to those presented here as to render it uncontrolling. . . . The facts of each case must be first considered before the limited language contained in any opinion of the court can be held controlling, and, where the facts are different, a different application must be made of the protective principles enunciated in the sections of the Codes . . .").

46. For an example of a court interpreting precedent in much the same way as this example suggests, see *infra* note 149 and Part III.A.1.

In general, it is artificial to ignore what courts have said about the law or even to treat it as abstractly persuasive commentary rather than law. To do so leads to the loss of potentially valuable opportunities for litigants, lower courts, and future courts hierarchically coordinate with the original one to avoid needlessly litigating an issue (or an aspect of an issue) that the original court has in a real sense already decided.

Note that courts' pronouncements are not necessarily simple black-and-white statements of legal principles or rules. Often courts, as in my example, express judgments about the relative force of two arguments, about the ease of a case, and so on.⁴⁷ These statements are, like anything else, interpretive aides, and there is no need to treat them as nonbinding merely because they do not state an operational rule. "The case is an easy one, and we caution the defendant that its defense, while perhaps impressively aggressive in some circles, overreached in many ways" is valuable information, and information *about the law*—not merely information offered in passing for legal realists trying to interpret the future activities of courts.⁴⁸ "We find most of the defendant's arguments vacuous" is, similarly, valuable information, and the choice of the word "vacuous" tells us more than the word "incorrect"—and something very different from the phrase "compelling in many respects but ultimately flawed." Of course, those who divide holdings from dicta can still treat dicta as persuasive or influential, but my view goes beyond this: statements concerning the strength of arguments are—if the context justifies interpreting them as such—binding announcements of legal reasoning by the court. To the extent courts in the future see themselves as bound by the prior court's precedent, they are *not* free to ignore those statements or treat them as mere arguments with the capacity to be persuasive. Instead, they are bound by whatever the force of those statements is: it would be wrong of them to see themselves as bound by the prior opinion and yet disagree, without distinguishing the case, as to the strength of the arguments, or the likelihood of sanctions, that the prior case discussed. Or, at least, there is no reason for us to ignore that possibility—the idea that in appropriate situa-

47. Cf. *infra* notes 60-61 and accompanying text.

48. It is important to emphasize that I do *not* aim to equate precedent with legal-realist prediction of the activities of future courts. I agree with, for instance, Felix Cohen that determining precedent is a broad, pluralistic inquiry rather than a narrow, formal one. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843-44 (1935); see also Note, *Implementing Brand X: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1545-46 (2006). But the broad, pluralistic inquiry at the root of my view of precedent is one aimed at explicating law by determining the intent of those who make it—not one that relies on the use of existing materials to make psychological inferences about future judges.

tions one court can apply the judgment or reasoning or emphasis of a prior court, rather than just the prior court's more definite conclusions.

The result, instead of a sharp distinction between holdings and dicta, is a *continuum of authority* along multiple axes. An announcement by a court can be narrow or broad, definitely or conditionally binding, determinative of a *result* or of a *process*, and so forth. *Precedent* reflects those elements of prior judgments that future courts adopt instead of redeveloping. As the next Section describes, courts in fact do apply precedent adaptively and flexibly in this way, even to statements that do not express definitive results.

C. A Plausible View

Before considering in more detail the merits of my approach, it is worthwhile to pause to demonstrate that, in fact, the view of precedent I am setting out is one that is often applied by common-law courts, even as they recite the familiar formal rules about the distinction between holdings and dicta. In view of Llewellyn's advice almost fifty years ago that "if you are trying to get away from a 'non-holding' ruling today, you would do well to go at it as seriously as if it were the flattest holding,"⁴⁹ this demonstration should not be surprising. Still, it is useful to show that what I suggest can be put into practice more broadly—that nothing practical *demand*s the strengthening of bright-line rules in analyzing precedent.

The broadest and clearest example of the notion that there is a continuum or sliding scale of the strength of authority, rather than a sharp split between holdings and dicta, comes from the way federal courts respond to Supreme Court dictum. The view in several federal circuits is that "[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."⁵⁰ Most federal circuit courts, in setting out this view, write consistently with my view of a sliding scale rather than a strict dichotomy. For instance, one circuit has written as follows:

When the [Supreme] Court's view is embodied in a holding, the Court's reluctance to overrule its precedents enables a confident prediction that that holding is "the law." When the view is embodied in a dictum, prediction cannot be made with the same confidence. But where it is a recent dictum that considers all the relevant considerations and adumbrates an unmistakable conclusion, it would be reckless to think the Court likely to adopt a contrary view in the near future. In such a case the dictum provides the

49. LLEWELLYN, *supra* note 1, at 103.

50. *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 n.3 (1st Cir. 1993); see also *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (quoting *Doughty*, 6 F.3d at 861 n.3).

best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.⁵¹

Another circuit has written similarly, saying that it sees itself bound by Supreme Court dictum "almost as firmly as by . . . outright holdings," and it suggests other criteria that will affect the *strength* by which it sees itself as bound, such as the age of the dictum and whether later statements have "enfeebled" it.⁵² I am not suggesting that courts have developed in precise terms the notion of a continuum of authority, but it is hard to interpret these opinions as suggesting anything but a view that various pronouncements by courts can be binding to more or less a degree than others, based in large part on contextual matters of interpretation. Holdings need not be, according to courts, authoritative in all cases,⁵³ and authoritatively worded dicta are not either clearly authoritative or clearly not in all cases.⁵⁴

51. *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994).

52. *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996).

53. See *Reich*, 33 F.3d at 757 (referring to pragmatic reasons that a holding "enables a confident prediction"); *Tustin Cmty. Hosp., Inc. v. Santa Ana Cmty. Hosp. Ass'n*, 153 Cal. Rptr. 76, 81 (Ct. App. 1979) ("Very little by way of explanation of this distinction was presented, and if the reference to affirming the injunction was not technically dictum, it was an essentially passing observation on a matter of no substantial controversy.").

54. For an early statement of a view broadly consistent with my analysis, see *De Nobrega v. De Nobrega*, 14 Haw. 152 (1902):

But perhaps as important a question as that of whether an opinion is a decision or a dictum is that of the weight to be given to it if it is a dictum. To hold that an opinion is a dictum is not equivalent to holding either that the court in the particular case acted unwisely in giving it or that no respect should be shown it. There are all shades. Even an actual decision may be reversed if clearly erroneous. An opinion expressed after full argument and due consideration upon a doubtful point closely connected with, or apparently though not necessarily involved in a case, should perhaps, on principle, be given greater weight than an actual decision rendered upon little argument and consideration. It should at least be given greater weight than an opinion expressed merely by the way. There is no doubt a greater tendency now than there was formerly to pass upon questions presented but not necessary to be decided, and doubtless courts often go too far in that direction. Just how far they should go in any particular case depends largely upon the circumstances of that case. Whether in this instance the court should not have expressed an opinion at the former hearing upon the question now raised, we need not say. There is much that can be said on both sides. Perhaps the strongest reason that can be urged in support of the course pursued is, that the case was to go back to the Circuit Court for further action and that that court would naturally want instructions upon the point in question and that, if such instructions were not given, the case would probably be brought to this court again for the settlement of the question. Under such circumstances, with a view to settling the law of the case once for all, the court would often be justified in going further than it would under some other circumstances.

Id. at 153-54 (citations omitted). Hawaii courts have not abandoned this approach. See *Robinson v. Ariyoshi*, 658 P.2d 287, 298 (Haw. 1982) ("[W]e think a more constructive approach would be to consider a statement of a superior court binding on inferior tribunals,

The opinions of the Supreme Court are not in a class by themselves in this respect. For instance, a federal district court may similarly infer the intent of its circuit court of appeals based on prior opinions.⁵⁵ State courts tend to do the same with their higher courts,⁵⁶ and federal courts treat state dicta similarly when deciding issues of state law.⁵⁷

The practice of courts, more generally, falls in line with my view more readily than with a classical or formal view of holdings and dicta. Courts, for example, routinely extrapolate from their prior cases in a way that suggests the prior cases entail their results in what is essentially precedential fashion, based on prior courts' intent. A particularly telling example is *Hernandez v. Crawford Building Material Co.*,⁵⁸ in which the Fifth Circuit found a point of law so "clear"⁵⁹ and "obvious"⁶⁰ from prior case law that a district court had committed plain error—for which there is an exceedingly high standard⁶¹—even

even though technically dictum, where it 'was passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, and the opinion was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended.' " (quoting *De Nobrega*, 14 Haw. at 155)).

Other state court systems use language consistent with the view I am setting forth. See, e.g., *Vons Cos. v. U.S. Fire Ins. Co.*, 92 Cal. Rptr. 2d 597, 602 (Ct. App. 2000) ("[I]t is important to remember that the language of an opinion must be construed in light of the facts of the particular case, an opinion's authority is no broader than its factual setting and the parties cannot rely on a rule announced in a factually dissimilar case." (citing *Cochran v. Cochran*, 66 Cal. Rptr. 2d 337 (Ct. App. 1997))).

55. See, e.g., *United States v. McNaughton*, 848 F. Supp. 1195, 1204 n.5 (E.D. Pa. 1994) ("Since the Third Circuit held that the conduct in *Crook* did not violate the anti-contact rule, the statements regarding suppression are technically dicta. I believe, however, that the Third Circuit would have made the same determination as to suppression if it *had* found an ethical violation, since the same rationale would apply."). Note that, technically, a prediction about future intent is distinct from an inference about past intent; the language in *McNaughton* is consistent with either.

56. See, e.g., *Zamora v. Shell Oil Co.*, 63 Cal. Rptr. 2d 762, 766 (Ct. App. 1997) ("Although *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) involved a breach of warranty claim making the court's statement on negligence technically dictum, courts generally have adopted and applied this statement of law to negligence actions."); *Wilkins v. State*, 543 So. 2d 800, 802 (Fla. 5th DCA 1989) (referring to a dictum that "clearly indicates [what] a majority of the Florida Supreme Court, if directly confronted with the question, would hold"); *In re Brody Estate*, 26 Pa. D. & C.2d 409, 417 (Orphans' Ct. 1962) ("Although not essential to the decision of the case, and, therefore, technically dictum, the statement made by the [Pennsylvania] Supreme Court as the rationale for its decision in the *Wright* case indicates the conclusion to be reached in the pending case.").

57. *Travelers Indem. Co. of Ill. v. DiBartolo*, 131 F.3d 343, 352 (3d Cir. 1997) (Nygaard, J., dissenting) ("Carefully considered, relevant statements by a state supreme court, even if technically dicta, provide a federal court with reliable indicia of how the state tribunal would rule on a particular question." (citations omitted)).

58. 321 F.3d 528 (5th Cir. 2003).

59. *Id.* at 532.

60. *Id.* at 533.

61. Plain error requires "an *obviously* incorrect statement of law that was 'probably responsible for an incorrect verdict, leading to substantial injustice.'" *Id.* at 531 (emphasis added) (quoting *Tompkins v. Cyr*, 202 F.3d 770, 784 (5th Cir. 2000)).

though “there [were] no reported decisions from this circuit dealing directly with this question.”⁶²

Even opinions that simply state the relative strengths of parties’ arguments (or nondispositive presumptions of various strengths for or against parties’ arguments) have often done more or less what I have suggested they ought to do. That is, courts are generally willing to consider precedential pronouncements about the *force* of arguments, rather than only about their strict *correctness* or the results that follow from them. It is worth drawing a distinction here between presumptions that courts are bound to make as part of a particular procedural test and presumptions that are meant only to influence courts in weighing the strengths of legal arguments. The former are conventionally seen as rules necessary for a court’s disposition of a case. The latter, however, are less so: they neither entail a result nor provide a statement necessary or sufficient for the disposition of a case. They are instead merely statements of preference—of the court’s temperament or disposition. Nonetheless, they are (appropriately) still treated as binding. Thus, for instance, a district court might “tak[e] into consideration [a] Circuit’s disfavor” of a practice⁶³ or decide that it “must” act in a particular way because its circuit “disfavors” a practice, having called it “draconian.”⁶⁴

D. Normative Considerations

One purpose of this Article is simply to call into question the modern-day necessity of the minimalist approach to interpreting precedent. In deciding whether a statement from a prior opinion is binding, common-law courts still have choices other than to rely on the statement’s logical necessity to the opinion’s outcome, despite what appears to be a resurgence of the classical minimalist view. So far, I have suggested that other approaches are possible and that there is no reason we should not consider them. In a modest sense,

62. *Id.* at 532. The issue in *Hernandez* concerned whether filing of a counterclaim to a Title VII of the Civil Rights Act of 1964 was retaliatory. The court characterized previous circuit holdings as standing for the proposition that “this circuit has taken a . . . skeptical view [that such actions could be considered retaliatory], remarking that ‘it is not obvious that counterclaims or lawsuits filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII.’” *Id.* (quoting *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999)). The court concluded that “the district court committed plain error in instructing the jury that [a] counterclaim could support a finding of retaliatory employment action.” *Id.* at 533.

63. *Blue Ribbon Commodity Traders, Inc. v. Quality Foods Distribs.*, No. 07-4037, 2007 U.S. Dist. LEXIS 90813, at *10 (E.D. Pa. Dec. 11, 2007) (“After applying the facts of this case to the factors set out by the Third Circuit in *Emcasco*, as well as taking into consideration this Circuit’s disfavor for default judgments and preference for deciding cases on the merits, the default judgment . . . will be set aside.”).

64. *Rivera v. Fulton*, No. 06-CV-488F, 2007 U.S. Dist. LEXIS 11221, at *6 (W.D.N.Y. Feb. 12, 2007).

then, I will consider the foregoing discussion successful even if it only reminds courts and commentators that there are nonformalist options they may consider (or reconsider).

I believe that the view I am setting out also more readily and more specifically promotes values that are implicated in deciding how precedent should be defined and interpreted. This Section demonstrates why. The chief reason is that sharp lines between holdings and dicta do not tend to accomplish their stated purpose (or any other purpose), whereas the view I am setting out is both more functional and more realistic.

Indeed, the minimalist approach suffers from conceptual confusion and gives courts poor incentives when they interpret prior cases.⁶⁵ This Section spells out these problems and, in doing so, more fully contrasts my view with the minimalist approach.

1. *Judicial Restraint and the Separation of Powers*

(a) *Power and Dicta*

The principal defense of the distinction drawn by the classical minimalist view—that holdings are meant to be binding and dicta are not—is rooted in notions of political theory.⁶⁶ The power of the judiciary, compared to that of the legislature, is said to be limited. Judges, we are told, should not make more law than they need to make. Many features of courts are said to inform this conclusion. For one thing, courts do not have the same capabilities as legislatures; they are not able, or at least not typically positioned, to hold independent hearings and engage in their own factfinding.⁶⁷ They are responsive and can rarely take initiative to develop solutions to problems. Norms also constrain their policymaking creativity. As Lawrence Friedman nicely put it, common-law courts generally cannot easily determine “what the speed limit ought to be, or the butterfat content of ice cream,” and they “could not possibly

65. In discussing incentives here and later, I do not mean to suggest that I think judges necessarily respond to specific incentives in the way that economists might predict they would; I do not, for instance, assume that judges want to aggrandize their own power and that they look for ways of doing this while still adhering to a set of formal rules. But my argument throughout is that the minimalist view creates no better incentives, on balance, even for those concerned with aggrandizement and for those who believe judges are sensitive to small incentives involving the rules of precedent.

66. See, e.g., Abramowicz & Stearns, *supra* note 3, at 1018-20 (“Constraint is perhaps the most significant normative consideration in justifying limits on the scope of holdings.”); Leval, *supra* note 4, at 1258-59 (“Stare decisis inevitably results in courts having some lawmaking power. If the court is obliged to adhere to its prior decisions, every decision becomes a part of binding law. But it was not the purpose of stare decisis to *increase* court power. To the contrary, the rule was intended as a limitation on the courts.”).

67. See Leval, *supra* note 4, at 1260-61.

'evolve' a Social Security law."⁶⁸ Moreover, courts often are democratically unaccountable.⁶⁹

Of course, the matter is not that simple on any of these counts. Courts can hear and even seek input from amici curiae (friends of the court),⁷⁰ call their own expert witnesses,⁷¹ and even broadly supervise the parties' ongoing activities.⁷² As for political legitimacy, judges are *at least* appointed by elected representatives (as in the federal system)⁷³ and are often elected themselves (in state systems).⁷⁴ But the point remains that courts have a more restricted lawmaking role than legislatures, both by policy and by institutional structure.

Unfortunately, the formal line between holdings and dicta serves the goal of restricting judges poorly for several reasons. First and most importantly, formal constraints tend to be ineffective, particularly if the judges who are meant to be constrained are themselves left to enforce them. To see why this is so, consider an objection that has been leveled against the minimalist and result-oriented views of precedent—namely, that facts can be stated at different levels of generality, so that it is difficult to determine what a case stands for if we look only at its results or its particular holdings. Professor Eisenberg, following an analysis by Julius Stone,⁷⁵ observes that the multiplicity of levels of abstraction at which a rule can be stated makes it hard to know, after the fact, how to apply a view of precedent that rests on what was literally necessary to resolve the case in front of a court.⁷⁶ "[E]very material fact in a case can be stated at different le-

68. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 22 (2d ed. 1985). Some arguments also seem to follow from a particular conception about the role or function of courts—that is, they should decide cases and do nothing more because they are courts. *E.g.*, Leval, *supra* note 4, at 1261 ("[D]ictum . . . is always—by definition—superfluous to the court's performance of its job."). However, I take these arguments standing alone to be circular.

69. *See, e.g.*, U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

70. *See* FED. R. APP. P. 29. For an example of an appointed amicus curiae, see *United States v. Locklear*, 97 F.3d 196, 197-98 (7th Cir. 1996).

71. FED. R. EVID. 706.

72. *See* *Plata v. Schwarzenegger*, No. C01-1351TEH, 2005 U.S. Dist. LEXIS 8878, at *33 (N.D. Cal. May 10, 2005) (issuing an order to show cause "why a receiver should not be appointed to manage health care delivery for the Department of Corrections until defendants prove that they are capable and willing to do so themselves or by contracting with an outside entity"); *Shaw v. Allen*, 771 F. Supp. 760, 762 (S.D.W. Va. 1990) ("Where more traditional remedies, such as contempt proceedings or injunctions, are inadequate under the circumstances a court acting within its equitable powers is justified, particularly in aid of an outstanding injunction, in implementing less common remedies, such as a receivership, so as to achieve compliance with a constitutional mandate.").

73. *See* U.S. CONST. art. II, § 2.

74. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127 & n.81 (1977).

75. Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959).

76. EISENBERG, *supra* note 1, at 53-54.

vels of generality," Eisenberg writes, "each level of generality will tend to yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court."⁷⁷ These same options, of course, give courts discretion in choosing a rule to adopt.⁷⁸

Consider the problem in more detail. Suppose the facts of an old case include *A*, and the opinion in the case says, "We see *A* as a specific case of *B*, and on *B* we hold for plaintiff." In formal terms alone, the minimalist approach cannot stop a runaway court, or one that aimed to aggrandize its own role, from setting *B* to be as general as possible; indeed, a court could conceivably always say, "The plaintiff wins because she is a plaintiff." Or, to press the boundaries of the minimalist approach to the absurd, "We see this case as one in which the parties are in conflict. In such cases, the rule is *R*." Of course, I am not suggesting that courts in fact would do this; norms governing the judicial role, if nothing else, would likely prevent it. Legislation governing courts could prevent it as well. My point is only that the minimalist approach is ill-suited to address the problem of a court that wishes to aggrandize its own power.

This appears to be true regardless of how the minimalist approach is stated. On Judge Leval's view, a statement like "We see *A* as a case of *B*" may well be necessary to the result of a case; its opposite often cannot be stated while preserving the sense of the opinion. Abramowicz and Stearns acknowledge that under their view, judges can choose among alternative "paths" to a holding and "the appropriate level[s] of breadth" of a holding;⁷⁹ but then it is not clear how their approach would constrain a self-aggrandizing court. Abramowicz and Stearns say, "The judge must pick some decisional path to resolve the actual case presented. As long as a judge does pick an appropriate path from material facts to judgment, the judge remains considerably constrained."⁸⁰ But the word "appropriate," rather than the distinction between holdings and dicta, seems to do all the work in constraining judges. The same constraint is of course available in my approach: a court cannot issue broad, inappropriate pronouncements and expect other courts to follow them.

A separate consideration is that the choice of the breadth of precedent largely concerns allocation of power *within* the judiciary, not between courts and other political institutions. To the extent precedents are not commonly overruled, their breadth allocates power away from later courts and toward earlier courts. In the strictest

77. *Id.*

78. *See id.* at 61-62 (suggesting that formal constraints are weak because of the way courts can "massage the facts").

79. Abramowicz and Stearns, *supra* note 3, at 1066.

80. *Id.* at 1027.

sense, this is all it does: it does not by itself allow courts to override the rules set by legislatures or to hear cases they could not have otherwise heard. In the steady state, we should not expect the breadth of precedent to influence greatly the amount of power the judiciary as a whole holds.

Admittedly, the broader courts' pronouncements are, the more power courts might be perceived to hold and the more influence they might have over even nonparties to disputes. But there is no reason to imagine that rules about holdings and dicta are the only possible way, or even the most important way, to limit the scope of courts—or that other rules would not arise, or have not already arisen, to limit judicial discretion. Constitutional and jurisdictional limits, norms of judicial behavior, rules imposed by the legislature or higher courts, and even rules directly concerned with the practical scope of individual judicial holdings (rather than about whether those holdings were logically “necessary” to resolve a particular dispute in a particular factual context) all could, and do, enforce restraints on the judiciary.

By contrast, if our concern is with the power of an individual court to set law broadly, rules separating holdings from dicta simply do not achieve this goal. In addition to the reasons already discussed, the limitations of the minimalist approach tend to be a poor fit for this goal. Just because a pronouncement is necessary to resolve a particular problem before a court does not mean, either logically or in practice, that the holding is narrowly tailored. As Part III shows, even the least significant factual dispute might implicate important questions of statutory interpretation (or other areas of law) that are formally necessary to resolve a dispute. The power a court has is likely to correlate poorly overall with the degree to which it issues pronouncements strictly necessary to resolve disputes. Even without artificially inflating the generality of its pronouncements, courts have broad scope to set law even if they can issue rulings only when necessary to resolve specific disputes. Indeed, the reason not to follow an opinion that held “The plaintiff wins because she is a plaintiff” is more that the holding is inappropriately broad (in light of substantive norms) than that it is dictum.

Given that norms about judges' proper roles (and, in the extreme case, constitutional limitations) likely have the most important part to play in limiting judicial discretion, the ability of a case-interpretation mechanism to restrain judges is perhaps beside the point. Nonetheless, it is important to note that the view I am setting out may well do a better job at encouraging proper restraint than a formal distinction between holdings and dicta. Under my view, court opinions are limited by their factual context: the broader a pronouncement, the easier it will tend to be for parties in the future to argue that the court did not mean to interpret new, specific facts

in the way it responded to old facts. This is not *logically* necessary; a court could well, under either my model or the minimalist approach, try to issue extremely broad and definite pronouncements of law on subjects relevant to the case before it. But as a practical matter, interpreting broad statements rigorously with the knowledge that they were produced in a limited factual context is probably a more effective restraint than asking whether those broad statements were logically entailed by a decision. Whether this is true is, strictly speaking, an empirical question, but there is little reason to believe that *necessity* to a decision alone appropriately tracks the goal of limiting judicial power.

In any event, a court intending to usurp power has broad ability to misstate facts or otherwise to manipulate the situation in such a way that formal constraints would not serve as a comfortable barrier against untoward judicial aggrandizement. Indeed, courts need not be nefarious to do this: courts honestly aiming to develop broad law might, under a formalistic rule about precedent, have an incentive to gloss over facts or simply to pay less attention to them. Conversely, courts aiming to minimize their own substantive reach, as a political matter, might have an incentive to dwell even on immaterial facts or otherwise to find ways to limit the force of decisions to particular facts. A less formalistic rule that depends on intent distorts courts' incentives less than a formalistic rule: a court intending to state a broad rule has no reason to hide from slightly adverse facts, and a court intending to state a narrow rule can still easily do so without trying to narrow it further by relating it explicitly to specific facts.

(b) *Constitutional Limitations*

Some, including Judge Leval, have additionally argued that under Article III of the United States Constitution, it is unconstitutional for federal courts to make law through dictum,⁸¹ apparently because Article III gives federal courts jurisdiction over "cases" and "controversies."⁸² The argument is that courts that make law through dicta (or accept other courts' dicta as law) are not deciding individual cases or controversies, but instead usurping the legislative powers granted by Article I and making law beyond the cases they are authorized to hear.⁸³

81. See Leval, *supra* note 4, at 1259-60; cf. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 2069 (1994) ("At the very least, sensitivity to the concerns underlying Article III ought to rule out extremely broad and extremely narrow conceptions of precedent. Moreover, as I have argued throughout this Article, those same concerns may constrain the notions of holding and dictum even further, if not as a matter of constitutional law, then perhaps as a matter of federal common law." (footnote omitted)).

82. U.S. CONST. art. III.

83. See Leval, *supra* note 4, at 1259-60.

I take no strong position on how federal courts' application of precedent is limited by Article III, other than to express skepticism—both in view of the way federal courts use dictum in practice⁸⁴ and the fact that rules of precedent are common-law rules⁸⁵—that the constitutional limitations are significant. It is true that federal courts may not constitutionally issue advisory opinions with no dispute before them.⁸⁶ Indeed, prudential arguments against advisory opinions, such as those that concern the status of the federal courts as against other branches of the federal government,⁸⁷ may well be compelling, but in any event they are beyond the scope of this Article; that is, this Article does not aim to encourage courts to issue general rulings unrelated to the facts of a case. As Hart and Sacks observed long ago, “[advisory] opinions, obviously, are at the extreme opposite pole of the normal type of judicial ruling on a question of law.”⁸⁸ To generalize from a rare, extreme case to a more common one is not persuasive in this context.⁸⁹

84. See *supra* Part II.C.

85. Cf. Dorf, *supra* note 81, at 2067-68 (“We know that Congress may, after all, direct the courts not to give res judicata effect to an earlier case. It hardly seems anomalous to recognize Congress’s power to craft rules of stare decisis.” (footnote omitted)); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 525-31, 542 (2000) (arguing as a federal constitutional matter that “Congress may consult the criteria the courts consult in formulating rules of precedent and may adopt any rule a court reasonably could adopt”).

86. See 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (New York, G.P. Putnam’s Sons 1891). There is a logical wrinkle here that does not concern nonformalists like me but might be more significant for those who apply more formal approaches to precedent: with no case before the court, and given a rigid separation between holding and dicta, on what basis can we say a federal court has ever *held* that to issue an advisory opinion would be unconstitutional?

87. See JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 1506 (9th ed. 2001).

88. HART & SACKS, *supra* note 33, at 638. Hart and Sacks are worth quoting at greater length on this subject:

In between [normal judicial rulings and purely advisory opinions] are an endless variety of situations in which one or more elements of a normal lawsuit are absent but in which decision is not open to all the objections which may be thought to exist in the situation of a request for a wholly general and abstract disquisition on the law. Ever since 1793 the federal courts have been recurrently occupied in blocking out more precise criteria for determining what constitutions a “case” or “controversy” appropriate for the exercise of “judicial power,” and hence appropriate as a vehicle for the authoritative resolution of the questions of law upon which a ruling is sought.

Id.

89. Moreover, constitutional limits on advisory opinions, and other constitutional limitations on the power of federal courts, may well demonstrate that common-law rules about precedent are simply unnecessary to restrain courts in the way that those who promote judicial restraint think is necessary. At least in some sense, rules for *interpreting* prior cases would be an artificial stopgap measure to respond to courts that have overstepped their jurisdiction.

In any event, state courts often occupy a different position in state constitutional schemes than federal courts do within the federal system. Too often in American legal scholarship, discussions of courts dwell on constitutional issues facing federal courts and implicitly de-emphasize the role of state courts and common-law issues.⁹⁰ Even if there were a constitutional limitation on federal courts' use of dicta, that limitation need not affect other American courts in the same way.

An interesting example of a broader role for a state court under a state constitution comes from California, in which state courts can manipulate precedent far more directly than by issuing dicta in concrete cases. The California Constitution has authorized the California Supreme Court to determine which judicial opinions are to be published.⁹¹ Under this authority,⁹² the court has adopted a rule giving itself the authority to publish or depublish opinions from within its court system at any time.⁹³ Unpublished opinions cannot ordinari-

To spell this out in more detail, consider an example Judge Leval offers of a tract on securities litigation issued by the Second Circuit with no case on the matter before it. *See* Leval, *supra* note 4, at 1260. For an analysis of precedent under the minimalist view, this sort of advisory opinion may seem essentially to be a degenerate case: given that no statements are necessary for a decision from the court about facts in front of it, the opinion contains no holding. But to say this tells us very little: this conclusion is circular, for it is available to us only because we have already decided that as a constitutional matter, no holding can be necessary when there are no specific facts before the court. Furthermore, it is somewhat odd to say that the opinion *means* nothing. (Surely a state-court opinion that were wholly advisory but nonetheless constitutional could have "holdings" necessary to the question the court was intending to answer.) An analogy would be a maxim of statutory interpretation that said, "Statutes not validly enacted do not alter the law." This is not actually a rule of interpretation but a rule about the valid enactment of statutes.

Instead, my reaction to a wholly advisory opinion is not that the court could not have meant what it said or that, as a matter of common-law precedent, the court's pronouncement cannot bind later decisions by the court. It is simply that the court probably had no authority to act in the way it tried to act. I agree that a pronouncement as broad as the one Judge Leval gives as an example is distasteful in a common-law system, but I believe this distaste is captured fully by the observation that a wholly advisory pronouncement very likely oversteps a court's jurisdictional or constitutional limits—and, even if it does not, it violates our expectations of what courts should do. Thus, just as we saw in the case of courts that overstep norms of judicial behavior, the solution to federal courts that try to issue advisory opinions comes not from rules about precedent or interpretation but from explicit constitutional limitations.

90. For instance, though apparently aiming to develop principles generally applicable to American courts, Abramowicz & Stearns, *supra* note 3, cite ninety-two cases, of which eighty-nine are from federal courts and three are from state courts.

91. CAL. CONST. art. VI, § 14 ("The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate . . ."). *See generally* Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984).

92. *See* CAL. R. CT. 8.1100 ("The rules governing the publication of appellate opinions are adopted by the Supreme Court under section 14 of article VI of the California Constitution . . .").

93. CAL. R. CT. 8.1105(e)(2) ("The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.").

ly be cited to California courts.⁹⁴ Accordingly, the California Supreme Court has essentially full authority over what cases serve as precedent within the California courts. On its own motion or on request from "[a]ny person,"⁹⁵ the court can choose whether an opinion is precedent or not.

In at least a simple sense, the California Supreme Court can accordingly set California law without actually hearing individual cases. The court's rules explicitly disclaim that an order to publish or depublish an opinion reflects the California Supreme Court's view of the merits of that opinion,⁹⁶ but the court can nonetheless change what the law is by ordering an opinion published or depublished.⁹⁷ Indeed, at least one former justice of the California Supreme Court, Joseph R. Grodin, has suggested that, in practice, the court's view of the opinions it orders published or depublished can be inferred in precisely the way we might expect, despite the rule to the contrary:

On . . . numerous occasions since 1971, the California Supreme Court . . . ordered that certain opinions of the court of appeal be "depublished," that is, not printed in the Official Reports. This occurs even though the lower court deems the opinion to meet the applicable criteria for publication. And, I think it is fair to say, the supreme court has not done this, in the vast majority of such occasions, because it disagrees with the court of appeal over application of the criteria. Rather, it has done this because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent. It seems to have been the dominant view within the court that the selective exercise of the depublication option is both practical and proper.⁹⁸

Some might say the court "acts as a legislature" here in setting law without necessarily hearing cases related to that law, but trying to classify its activities as legislative or judicial is just an exercise in defining concepts. What matters for our purposes is instead that the court can manipulate precedent at least somewhat in the abstract.

94. CAL. R. CT. 8.1115(a)-(b).

95. CAL. R. CT. 8.1120(a); CAL. R. CT. 8.1125(a).

96. See CAL. R. CT. 8.1120(d); CAL. R. CT. 8.1125(d).

97. As noted, ordering an opinion depublished removes it as citable law. Conversely, ordering an opinion published requires lower courts statewide to accept it as binding.

In California, even appellate-court precedent is binding statewide, not district by district. See *Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara County*, 369 P.2d 937, 939-40 (Cal. 1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court."). Note that this means that in California, the binding effect of a higher-court opinion on a lower-court does not arise only from the higher court's ability to overrule the lower court; appellate courts have a more general, direct management function. Cf. case cited *infra* note 100.

98. Grodin, *supra* note 91, at 514-15 (footnotes omitted).

Some have criticized this scheme,⁹⁹ but it has lasted for some time and appears to be explicitly authorized by the state constitution.¹⁰⁰ My goal is not to defend California's approach, but only to demonstrate an even more extreme case of judicial lawmaking that is nonetheless apparently authorized by a state constitution. It is hard to imagine that given this power the California Supreme Court could not constitutionally issue dicta in cases it actually hears.

2. Foresight and Care

A related reason often put forth in favor of a sharp line between holdings and dicta is that the line simply leads to better rulings. This appears to be posited as a fact of the psychology of humans, particularly judges: they are better at resolving disputes when they can see the concrete implications of their decisions, when they are presented with arguments about particular cases, and when they are not required to speculate about the world. Thus, for example, Judge Leval argues as follows:

Conditions that best favor lawmaking by courts are those where the dispute is framed by concrete facts. Two of the most difficult challenges in lawmaking are understanding the facts that call for regulation and understanding what effect the imposition of any rule will have on those facts. When the assertion of a proposition of law determines a case's outcome, the court necessarily sees how that proposition functions in at least one factual context, at least with respect to the immediate result.¹⁰¹

I do not dispute that judges will tend to be better at resolving concrete issues rather than speculative ones—although it is worth noting that contentions to this effect are usually made by pointing to a handful of cases where dictum turned out to be overly broad, rather than by a careful analysis of history or psychology.¹⁰² Many of the most important judicial decisions have tended to announce rules that

99. See, e.g., Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519 (1994); Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033 (1993).

100. See *Schmier v. Sup. Ct.*, 93 Cal. Rptr. 2d 580, 584 (Ct. App. 2000) ("The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) the expense, unfairness to many litigants, and chaos in precedent research, if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions. By providing the mechanism for realizing this policy, the rules are consistent with the statutory scheme they were intended to implement." (citations omitted) (internal quotation marks omitted)).

101. Leval, *supra* note 4, at 1262.

102. See, e.g., *id.* at 1280-81.

were *implicated* by specific facts but went far beyond the individual factual context of a case, thereby requiring imagination and speculation. As a trivial example, *Brown v. Board of Education*¹⁰³ did not desegregate an individual school; it instead held that “[s]eparate educational facilities are inherently unequal,” referred to “the plaintiffs and others similarly situated,” and required a broad national response.¹⁰⁴ I am willing, nonetheless, to accept for argument’s sake that it is important to be circumspect about judges’ carelessness and lack of imagination when they speak in the abstract.¹⁰⁵

Even then, if our goal is to avoid following judges when they are careless or unimaginative, the distinction between holdings and dicta is nothing more than a heuristic guide. As we briefly saw earlier,¹⁰⁶ the fact that alternative holdings and pronouncements that prospectively overrule old precedent are not dicta is a basic example of this observation. Such statements are apt to be as considered and concrete as any statements that are logically classified as holdings rather than dicta, regardless of whether they are logically necessary to a case’s disposition.

Moreover, it is neither necessarily the case nor even, as we shall see, apparently true in many instances that holdings are more carefully reasoned than dicta. Instead, to the extent we care how much a court considered the wisdom of its pronouncements, we would do better to focus on that question squarely, using all available contextual information. The context includes such features as the degree to which the relevant issues appear to have been disputed, the depth of the court’s discussion, the arguments to which the opinion says the court was exposed, the degree to which the court itself says it reasoned about the pronouncements, the extent to which the court seems to stand by those pronouncements (for instance, are they stated certainly or tentatively, broadly or narrowly, absolutely or conditionally?), and the broad relationship between the facts of the case and the pronouncements. Bright-line rules are no substitute for sensitive reading. With the sort of attention that I am suggesting we pay to judicial opinions, I am confident that the carelessness with which Judge Leval is concerned will be addressed appropriately—and likely even better than under a bright-line rule.

103. 347 U.S. 483 (1954).

104. *Id.* at 495.

105. Of course, to the extent that intuitive decisionmaking by judges is problematic, we might alter the incentives judges have to deliberate carefully—e.g., by giving them more time or requiring discursive opinions in particular contexts. See generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007). We are not limited to taking judges’ strengths and weaknesses in the present deliberative system as given.

106. See *supra* note 15 and accompanying text.

For example, take Judge Leval's description of the way in which appellate courts have come to state, almost formulaically, the standards of review they plan to apply:

As a tiny, but recurring example, for every issue considered in courts of appeals, we pronounce ritualistically that our review is "de novo," or "for abuse of discretion," even where it makes no difference in the case because we conclude there was no error of any sort. It is the fashion in appellate decisions today to proclaim the standard that governs the type of questions, even when the particular standard announced will have no bearing on the resolution of the dispute. Characteristically, a statement of a standard will be lifted without examination from a prior opinion. We think this practice is harmless. After all, we are doing nothing more than correctly stating a rule of law.

If these superfluous pronouncements were indeed always correct, there would be no problem. Unfortunately, however, law is endlessly complex and subtle. . . . When we thoughtlessly copy a statement of law from a prior opinion in a manner that determines nothing in the case before us, we risk misunderstanding the context and getting it wrong, introducing confusion and error.¹⁰⁷

At the outset, there is a question of whether the minimalist approach actually rules out, as holdings, the statements of incorrect standards of review that Judge Leval would have it rule out. It would not be hard to imagine a situation in which the statement of the standard was strictly or logically necessary and yet was still copied incorrectly. Indeed, some variants of the minimalist approach would seem to rule such statements in rather than out. On the view of Abramowicz and Stearns, who do not specifically care whether a statement was *necessary* to a holding but whether it is necessary, sufficient, or otherwise along the path to a decision,¹⁰⁸ a statement of a standard of review on the way to a holding itself looks more like a holding rather than a dictum. That is, if what is needed for or on the decisional path to a holding is not what is logically *necessary*, but instead what is included in the steps of a putative flowchart necessary to reach a decision, the statement of a standard of review would be classified formally as a holding.¹⁰⁹

107. Leval, *supra* note 4, at 1267.

108. See Abramowicz & Stearns, *supra* note 3, at 967-69, 1075.

109. As an aside, if the minimalist approach were indeed historically concerned with carelessness on the part of judges, we would expect it to do a better job in responding to careless recitation of *facts*, rather than exclusively *law*. But even the approach's classical proponents, like Arthur Goodhart, have said that carelessness or imprecision in the announcements of facts barely matter in affecting the holding that a court intended. See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 170 (1930) ("If there is an opinion which gives the facts, the first point to notice is that we cannot go behind the opinion to show that the facts appear to be different in the record. We are bound by the judge's statement of the facts even though it is patent that he has mistated

In any event, my view dispatches this sort of problem more directly and more clearly than the minimalist approach. Instead of focusing our attention on how necessary or related to a holding the statement was, my view would suggest that a careless, in-passing recitation of an irrelevant standard of review is not precedent simply because the court did not intend for it to be precedential. From context, it is not ordinarily difficult to determine when such a statement is recited carelessly or simply copied and pasted from one opinion into another. Much like a contract into which boilerplate was erroneously copied, such an opinion is not meant to be interpreted literally throughout.¹¹⁰

There is a wrinkle here: the formal difference between holdings and dicta could come to matter to courts merely because previous courts have thought they mattered. In other words, to the extent courts conform their writing and reasoning to particular formal structures, those formal structures may carry substantive interpretive weight. Courts might be more careless when announcing "dicta" simply because they are dicta and the courts expect, because of reigning formalistic language about precedent, that later courts will not pay as much attention to them. If courts explicitly intend to draw the separation, then of course they have the ability to do so, and it would be foolish to ignore it. My view requires only that we not draw the line there when courts have not intended that we do so and that we not insist that courts adhere to the line if better alternatives are available.

A deeper problem with using the minimalist approach to respond to carelessness is best developed through an example. I borrow one from Judge Leval—a case of a court progressively laying out rules for the card game of poker.¹¹¹ Leval gives a hypothetical opinion of a court deciding whether three-of-a-kind Jacks beat a pair of Queens (as in poker they do): "When held in equal numbers, Queens beat Jacks. But three-of-a-kind always beats a pair."¹¹² Suppose the opinion had been written by a judge less careful or thoughtful than Leval, so that it instead read as follows: "A hand that holds two Queens beats a hand that holds two Jacks. But three-of-a-kind always beats a pair."¹¹³

[sic] them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment."). In other words, the *actual* facts of a case do not matter directly in setting the rule that the court announced; the facts as the court perceived them do.

110. Cf. *Elsinore Union Elementary Sch. Dist. v. Kastorff*, 353 P.2d 713, 714 (Cal. 1960) ("We have concluded that because of an honest clerical error in the bid and defendant's subsequent prompt rescission he was not obliged to execute the contract . . .").

111. Leval, *supra* note 4, at 1257.

112. *Id.* (internal quotation marks omitted).

113. This statement is less precise because a hand in poker can hold two Queens and nonetheless lose to a hand that holds two Jacks because of other features of the hands.

Judge Leval would conclude that the first sentence is nonbinding dictum because it is “superfluous to the court’s reasoning, which explained the grant of judgment to the plaintiff by reason of the plaintiff’s having three-of-a-kind.”¹¹⁴ On my view, we should proceed instead under the view that the court meant what it said, in view of its context. Our job, instead of looking to what was logically necessary to the decision, is to see what role the statement played in the court’s reasoning and what it allows us to deduce about its intent. In a later case in which the plaintiff has two Queens and nothing else of value and the defendant has two Jacks and nothing else of value, it would not be wrong for the plaintiff to say, “The law of this court is that my hand wins,” because that was precisely the sort of thing that the court had in mind in issuing the pronouncement in the first place. That a statement may have carelessly ignored some possible states of the world need not undermine that statement with respect to other states of the world.

But if a case arises that the court did not anticipate, such as a dispute in which one hand contains a Full House with two Jacks and the other’s only notable feature is two Queens (so that the first hand wins even though it has two Jacks while the other hand has two Queens), my view of the precedential force of the earlier opinion—no less than Judge Leval’s view—accommodates this error. The appropriate argument in response to the court’s carelessly broad statement would be: “The court was speaking of hands in which the only notable feature, for the purposes of scoring, was a pair of cards. It did not intend to state a rule governing other such hands.” Accordingly, the minimalist view creates no greater a barrier in this case than my view does.

Now consider a slightly different case—one in which the only issue is whether a pair of Jacks beats a pair of Queens. In a case like this, a court may well issue the very same announcement of the law: “A hand that holds two Queens beats a hand that holds two Jacks.” This statement is potentially careless for exactly the same reason that it was potentially careless before, but now it is necessary—in fact, central—to the court’s decision. The risk of carelessness is no less just because the statement was necessary. Indeed, the concreteness that is meant to help judges *decide* cases correctly does not necessarily help them write precedential opinions setting forth those decisions without inappropriately broad language. This distinction is largely what motivates Judge Leval when he writes: “When a court justifies a judgment in favor of the plaintiff or the defendant, the court necessarily confronts the cautionary realization that the rule

114. *Id.*

relied upon determines the outcome of the litigation.”¹¹⁵ But even if this is true, it does not mean that the rule *as expressed* is bound to be any more precise than dicta, particularly to the extent it might be understood to govern cases not immediately before the court. Even if the court was more likely to get the decision right in the case before it, it is no less likely to say, “A hand that holds two Queens beats a hand that holds two Jacks,” (or anything similarly imprecise) just because that statement is a holding.

The minimalist approach rules out carelessness only in dicta. My approach, uniformly for both dicta and holdings, is sensitive to the limitations in the context that led to the statement’s inclusion in an opinion. Sensitivity only to what was logically necessary for a decision fails in many cases to rescue us from the very sort of carelessness that proponents of the minimalist view fear.

3. *Judicial Economy and Generativity*

(a) *Management of Lower Courts*

Higher courts often have a desire to manage the operation of lower courts, and it is hard to suggest that they should not be able to do so, at least to some degree. After all, higher courts typically have a more general vantage point than lower courts, generally because they pool cases from greater geographic and subject-matter areas. At least between courts of appeals and trial courts, higher courts also tend to focus a greater proportion of their effort on considering questions of law.¹¹⁶ But perhaps more to the point, higher courts have the authority to overturn decisions of lower courts. If a higher court is confident in its prediction that it will decide a certain way on certain facts, it is more efficient to explain to lower courts that it intends to do so than to require the lower courts to figure this out by trial and error. Nothing in a higher court’s prediction of its own activity forecloses the opportunity to appeal or the opportunity for a trial court to distinguish precedent; the higher court could decide that its earlier view on the law was wrong. But between a rule that the higher court is likely to adopt and its opposite, it is more efficient (for both the

115. *Id.* at 1263.

116. Cf. David L. Faigman, *Appellate Review of Scientific Evidence Under Daubert and Joiner*, 48 HASTINGS L.J. 969, 978-79 (1997) (arguing that appellate courts are well situated, for a variety of reasons, to review scientific disputes); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 112-14 (1995) (arguing in favor of specialization in trial courts because trial judges often have little time for research, whereas “most appellate judges will have time to ‘go to the books’ ”); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005).

parties and the courts) for lower courts to apply the rule that is likely correct.¹¹⁷

In practice, this sort of management of lower courts occurs routinely. For instance, the Supreme Court is aware of its own use of dicta as a way to guide lower courts, including state courts, on matters of federal law:

Virtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases. It is quite wrong to invite state court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case.¹¹⁸

Federal appellate courts also appear to have developed the notion of *binding dictum* when it serves managerial efficiency. Concurring in an en banc decision of the Ninth Circuit, Judge Tashima wrote as follows:

When, as here, the guidance of the en banc court is necessary to ensure that future three-judge panels will act consistently regarding the binding effect of precedent, it is eminently appropriate for the en banc court to address matters that, while not necessary to the decision of the case, are vital to the administration and development of the law of the circuit. In such instances, when the en banc court exercises its supervisory authority over three-judge panels, its decisions should be recognized as authoritative and binding.¹¹⁹

As Judge Leval notes as an example for him of the dangers of dicta, this view was recently adopted more broadly by the en banc court in *Barapind v. Enomoto*.¹²⁰ Observing that a panel of the court had addressed an issue that had been raised in *Quinn v. Robinson*¹²¹ concerning whether a criminal offense was extraditable in view of whether the offense was "incidental to" a political uprising, the *Barapind* court wrote:

117. I do not mean to take a position here on precisely how powerful higher courts should be with respect to lower courts. My view does not require that lower court be bound to strictly follow precedents created by higher courts in all cases.

118. *Carey v. Musladin*, 549 U.S. 70, 79 (2006) (Stevens, J., concurring) (citations omitted); see also *Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring and dissenting) (writing consistently with what I have called a *continuum of authority* by observing that "[a]lthough technically dicta, [a prior] discussion . . . was an important part of the Court's rationale for the result it reached, and accordingly is entitled to greater weight than the Court gives it today" (emphasis added)).

119. *Miller v. Gammie*, 335 F.3d 889, 904 (9th Cir. 2003) (Tashima, J., concurring) (citations omitted) (internal quotation marks omitted).

120. 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam).

121. 783 F.2d 776, 796 (9th Cir. 1986).

The extradition court operated under a mistaken understanding of what constitutes circuit law. In *Quinn*, the proper scope of “incidental to” was an issue presented for review. We addressed the issue and decided it in an opinion joined in relevant part by a majority of the panel. Consequently, our articulation of “incidental to” became law of the circuit, regardless of whether it was in some technical sense “necessary” to our disposition of the case. The extradition court thus erred in concluding that it was not required to follow *Quinn*.¹²²

In setting consistent law, despite what was logically necessary for a decision, the en banc court saw itself as fulfilling its rule-based mandate to “secure or maintain uniformity of the court’s decisions.”¹²³

Barapind v. Enomoto is a particularly interesting case for Judge Leval to have raised because it demonstrates both conceptual and practical problems with the minimalist view. *Quinn* and *Barapind* deal with whether a particular criminal offense in another country is extraditable or not because of its political character. The test for answering this question has two prongs—whether there had been an “uprising” in the foreign country and whether the relevant offense had been “incidental to” (or otherwise in furtherance of) that uprising.¹²⁴ As is commonly the case with two-pronged tests, the parties vigorously disputed both prongs.¹²⁵ The *Quinn* court announced decisions for both. First, it decided that had there been an uprising, the offense relevant to the case would have been incidental to it.¹²⁶ Second, it decided that there had been no uprising.¹²⁷ Accordingly, the offense before the court was extraditable—it was not sufficiently political to bar extradition under the court’s test.¹²⁸

The essence of Judge Leval’s argument is that because the first of the prongs (“uprising”) was sufficient for the *Quinn* decision, and thus because the second (“incidental to”) was not necessary for that decision, rules announced concerning the second prong are not binding even though both prongs were argued before and reviewed by the court.¹²⁹ On this approach, the status of rules announced for the second prong would turn on what is essentially an accident—that is, on other unrelated law as it was applied to the particular case before the court. In *Quinn*, there is little evidence that the court’s discussion of the second prong, not strictly necessary for the court’s decision, was reasoned any less carefully—or in view of less tangible facts or

122. *Barapind*, 400 F.3d at 750-51 (footnotes omitted) (citations omitted).

123. FED. R. APP. P. 35(a)(1); *Barapind*, 400 F.3d at 751 n.8.

124. *Quinn*, 783 F.2d at 806.

125. *Id.* at 811-12.

126. *Id.* at 811.

127. *Id.* at 814.

128. *Id.* at 811-18.

129. Leval, *supra* note 4, at 1251 & n.8.

less vigorous argumentation—than the first. Beyond the charge that the rule *might* have been carelessly stated merely because it was not logically necessary to the court's holding (which has the feel of a circular argument when the question is precisely what status to assign to propositions not strictly necessary to a court's holding), I can discern no reason that the result on one prong should affect the legal status of the court's pronouncements on the other prong.

Indeed, the elevation of form in interpreting the precedent of a case like *Quinn* appears to require entirely arbitrary distinctions to be drawn. Suppose that instead of having been presented as two coordinate prongs of a single rule, the two questions at issue in *Quinn* had been presented as necessarily serial inquiries. That is, instead of imagining two coordinate questions, we could imagine that the relevant legal rule required the court to walk through a series of steps. At least Abramowicz and Stearns would then, on their view of the separation between holding and dicta, allow for announcements on the second prong to be "holdings" because considering the first question "is a necessary first step to the subsequent inquiry."¹³⁰ In making this observation, Abramowicz and Stearns use the example of a decision that a plaintiff has standing even though her case has no merit, for questions about standing in federal courts are ordinarily treated as threshold inquiries to be addressed before the merits of a case are addressed.¹³¹ But it could be said, very similarly for our purposes, that to prevail in a federal case, there are two prongs the plaintiff must satisfy: (1) standing and (2) success on the merits. Similarly, in *Quinn*, the question of whether the foreign offense under consideration is extraditable could be framed as follows: "Before we can consider whether there was an uprising, we need to consider whether the defendant committed an offense that could have been sufficiently related to one. We find in this case that he did."

(b) *Generation of Rules*

The generation of legal rules is not useful only to courts but also to the public. Indeed, enriching the supply of legal rules that are useful to the public is, at least for some scholars, the primary reason for subsidizing the judiciary rather than requiring that parties pay its full cost.¹³² Public support of private disputes is useful, according to this view, because the generation of rules is a public good. Of course, generating bad law can be particularly destructive, and in Part III,

130. Abramowicz & Stearns, *supra* note 3, at 1076.

131. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). The same is generally true about jurisdictional issues in federal courts: jurisdiction cannot be assumed even in cases where the court declines to grant relief. See *generally id.*

132. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 468-69 (5th ed. 2008).

this Article aims to address particular dangers related to the generation of bad law that exist under both a minimalist view of precedent and my own. But given the value of law, there should be at least a thumb on the scale against heuristics that support the wholesale truncation of law-generating possibilities.

4. *Clarity, Honesty, and Administrability*

I have already observed that even if we accept the goal of constraining the power of courts, sharp distinctions between holdings and dicta serve that goal poorly.¹³³ A separate but related question concerns the incentives that rules on precedent provide for judges to act honestly and clearly—with what Abramowicz and Stearns call “candor”:

By candor, we do not mean a naïve sense of disclosing the jurist’s subjective sensibilities about legal doctrine or case facts. Rather, we mean that the legal system seeks to ensure that judges disclose their genuine views concerning how the case they are deciding should be resolved within the context of existing legal doctrine.¹³⁴

Abramowicz and Stearns tie this conception of candor to the “rule of law”: without “meaningful expositions on the manner in which the court applies the governing rules to the case facts,” law becomes unreasonably uncertain.¹³⁵

Even for reasons beyond certainty and predictability, it is preferable for courts to express their reasoning accurately and clearly. For one thing, clearly expressed reasoning in response to a losing party’s case makes it clearer that the party’s arguments were heard and fairly considered.¹³⁶ It also contributes more to honest discussion and evaluation of legal decisionmaking—and to the role of courts more generally—than disingenuous or unclear exposition. It is not hard to imagine situations in which candor might be sacrificed for other goals,¹³⁷ but a norm of honesty and clarity in opinion-writing will tend to promote fairness and responsiveness.

Abramowicz and Stearns conclude that bright-line rules between holdings and dicta help implement this norm.¹³⁸ Their chief argument

133. See *supra* Part II.D.1(a).

134. See Abramowicz & Stearns, *supra* note 3, at 1024.

135. *Id.*

136. See Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 411-12 (1978) (referring to a “norm of explanation” in adjudications); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364-66 (1978).

137. See generally Mike Schaps, Comment, *Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right*, 94 CAL. L. REV. 1243 (2006) (suggesting that vagueness in certain opinions can reduce social and political conflict).

138. Abramowicz & Stearns, *supra* note 3, at 1093-94.

is that with a “clearer . . . holding-dicta distinction,” judges will find it harder to offer “disingenuous rationales for avoiding the central determinations of previous cases.”¹³⁹ This may be true to the extent that bright-line rules make it harder to write off a prior statement by a court as dictum when it is really a holding. But of course judges have other ways to avoid prior holdings disingenuously; for instance, they can always distinguish facts or otherwise misrepresent them.¹⁴⁰

In any event, the relative difficulty of clandestinely avoiding prior holdings is just one side of the equation. Even if sharp lines between holdings and dicta make it harder for new courts to pretend that old holdings are really dicta, they can give judges several undesirable incentives. For one thing, to the extent that the line between holding and dictum turns on the path judges choose to reach their decisions, judges who want to set law will have incentives to choose that path strategically, rather than candidly, in order to cover territory. Opinions are thereby distorted in a direction toward paths of reasoning that allow judges to issue more binding proclamations (if that’s what they want to do). On the view of precedent that Abramowicz and Stearns set out—which, recall, generally includes as holdings all statements on a decisional path that are necessary or sufficient to the result¹⁴¹—judges aiming to change the law may well have incentives to choose one path over another disingenuously.

As I also previously noted,¹⁴² at least under Abramowicz and Stearns’s view, the way a particular legal rule is stated—the statement of a rule as a threshold or serial inquiry rather than one requiring a parallel inquiry—influences the distinction between holdings and dicta; as a result, the view’s incentives risk distorting not only judges’ decisional paths but also the way they state substantive legal rules. For example, a court that intends to set precedent on a particular issue might try to state that issue as a necessary threshold inquiry rather than as one prong of a parallel test.

On my view, by contrast, judges have little incentive to obscure their reasoning in this way, even if they want to aggrandize their own scope; they will expect that what they say is taken as precedent to the extent they intended it to be. The facts of the case and other contextual features that led to the opinion may limit the breadth of the opinion’s precedent, but the presence of these limits as boundaries that the court cannot cross has no distorting effect; my view gives judges no reason to distort or obscure their intended message.

139. *Id.* at 1024.

140. See E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES* 130-35 (2005). Thomas believes that “all judges indulge in these gambits, those of a formalist inclination more so than others.” *Id.* at 133.

141. Abramowicz & Stearns, *supra* note 3, at 960-61, 967-68, 1065-66.

142. See *supra* Part II.D.3.

Simply put, clarity and honesty are aided by a view that allows court opinions to stand for what they were intended to stand for.

Moreover, to the extent opinions are meant to provide guidance to parties and laypeople rather than just to lawyers, simple rules about precedent that are based largely on overall context have a strong advantage over more technical rules. To apply Abramowicz and Stearns's view, the reader needs to trace back from a result all those propositions that were supportive of it. Their definition of a holding is recursive: holdings roughly include any "supportive proposition . . . that is necessary or sufficient for the case disposition *or for the disposition of another proposition that itself expresses a holding*."¹⁴³ This definition results in arbitrarily long chains of "support" that need to be traced out manually. As a demonstration of this approach in action, I reproduce here Abramowicz and Stearns's 419th footnote, an analysis of *Roe v. Wade*,¹⁴⁴ in full:

Statement (5) (state's interest in protecting fetal life is compelling after the second trimester) is necessary to statement (10) (state may regulate third-trimester abortions if it provides an exception to preserve mother's life or health). Statement (10) and statement (14) (statute regulates abortion in the third trimester while providing an exception to preserve mother's life or health) are necessary for statement (17) (the statute constitutionally regulates third-trimester abortion). Because the Court ultimately strikes down the statute, however, statement (17) is a nonsupportive proposition. Statement (3) (state's interest in protecting maternal health is compelling after the first trimester) and statement (6) (compelling interest in maternal health trumps compelling interest in fetal health) are both necessary to statement (11) (state may not regulate third-trimester abortions without providing an exception to preserve mother's life or health). Because the statute at issue does provide an exception, statement (11) is a nonsupportive proposition.¹⁴⁵

Indeed, if courts and parties were required to apply an analysis this formal to every complex opinion they read, the rule might be difficult even for *experts* to administer. To be sure, Abramowicz and Stearns do not mean to suggest that their development of chains of supportive propositions is mechanical; they note, for example, that "it would be possible to create a more detailed set of propositions,"¹⁴⁶ and there are likely multiple ways to characterize the court's reasoning in most cases. But this flexibility, while allowing the model they propose to adapt in view of reasonable interpretations of courts' opinions, ends

143. Abramowicz & Stearns, *supra* note 3, at 966 (emphasis added).

144. 410 U.S. 113 (1973).

145. Abramowicz & Stearns, *supra* note 3, at 1083 n.419.

146. *Id.* at 1082 n.415.

up providing a very complicated structure for debating questions of interpretation.

Of course, being appropriately sensitive to factual context can be difficult too, but only because some factual and argumentative contexts are themselves complicated. For example, it may be difficult to know whether a complex environmental case from the past governs a current environmental case, but that is just because it may be difficult to understand which features of the two cases are similar, whether there are any relevant differences, and so on. What my interpretive approach avoids, however, is procedural complication that arises only because of rules about how to interpret court cases. When cases are interpreted ordinarily rather than in a stylized fashion, they ought to be more accessible to lawyers and nonlawyers alike.

III. FACT-BOUND AND FACT-UNBOUND PRECEDENTS

Part II argued that the traditional distinction between holdings and dicta is neither necessary nor justified and that a view of case interpretation dependent on prior courts' intent serves the goals of adjudication better. Building on the view of precedent set out so far, this Part aims to demonstrate some problems that result when common-law courts engage in non-common-law reasoning. The principal danger arises in cases where courts interpret certain kinds of statutes, although the problem is not necessarily limited to statutes; it arises whenever common-law courts adopt rules that are not limited by a factual context.

The argument I make here does not strictly depend on Part II's conclusion. Indeed, those who draw rigid distinctions between holdings and dicta seem to do so in large part because they recognize a danger in precedents that are not sensibly bound to the facts of cases. For example, this concern seems largely to motivate Judge Leval, who observed that "[w]hen the assertion of a proposition of law determines a case's outcome, the court necessarily sees how that proposition functions in at least one factual context, at least with respect to the immediate result."¹⁴⁷ But seeing how a legal rule functions "in at least one factual context, at least with respect to the *immediate* result"¹⁴⁸ is often not enough to ensure the care, forethought, and concreteness with which both Judge Leval and I are concerned.

To put this differently, the problems this Part addresses are problems for both the minimalist view of precedent and my own. For the minimalist view, they demonstrate how a holding might be too broad even though it is logically necessary to the resolution of a single con-

147. Leval, *supra* note 4, at 1262.

148. *Id.* (emphasis added).

crete case. On my view, the problem is slightly different: it is that there is, in some cases, little or no way to determine how the facts of a case or other features of an opinion's context have limited the court's vantage point in ways relevant to the announcement the court has issued.

A. The Importance of Facts in the Common Law

1. Fact-Bound Expansion and Narrowing of Judicial Announcements

When common law proceeds as it ordinarily does, the law is *fact-bound*: it is ordinarily possible to read an opinion, understand the factual context that gave rise to it, and decide the appropriate scope of the court's pronouncements. As noted in Part II, a court's pronouncements do not necessarily mean what they literally say, devoid of context: they cannot ordinarily be pasted, wholesale and lifeless, into new opinions. Instead, their meaning depends on and is limited by context.

A court might accordingly make a broad announcement of a rule and then, in a later case, recognize that the announcement was broader than it intended. As a simple example, this is exactly what the California Supreme Court did in *People v. Avery*.¹⁴⁹ Under California law, theft requires that an offender intended to "permanently deprive" another of property.¹⁵⁰ In deciding the parameters of the intent necessary for the crime, the court had previously written as follows: "While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof."¹⁵¹ The court in *Avery*, however, was faced with a defendant who claimed that there was no proof that he had that particular intent; instead, he might have only intended to take the property temporarily.¹⁵² The California Supreme Court, faced with these facts, wrote that the relevant "intent" requirement, "although often summarized as the intent to deprive another of the property perma-

149. 38 P.3d 1, 4 (Cal. 2002).

150. *People v. Kunkin*, 507 P.2d 1392, 1396-97 (Cal. 1973) (quoting *People v. Brown*, 38 P. 518, 519 (Cal. 1894)).

151. *Avery*, 38 P.3d at 5 (quoting *Brown*, 38 P. at 519) (internal quotation marks omitted).

152. The underlying issue in *Avery* was the appropriate influence on a California sentencing provision of the defendant's no-contest plea on a charge of burglary in Texas. The Texas statute under which the defendant was previously convicted required only the "intent to deprive the owner of property." TEX. PENAL CODE ANN. § 31.03(a) (2007). By contrast, "California courts have long held that theft by larceny requires the intent to *permanently* deprive the owner of possession of the property." *Avery*, 38 P.3d at 3 (citation omitted). The defendant's sentence for a later crime in California would be enhanced if an out-of-state felony "involve[d] conduct that would qualify as a serious felony in California." *Id.* at 2.

nently, is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment.”¹⁵³ In other words, prior summaries were not crafted in light of the factual scenario that the *Avery* court faced; as a result, the prior announcement of the relevant standard was too broad.

Avery reflects, for the most part, a feature of the ordinary operation of common-law courts: decisions are stated and then narrowed or expanded as facts test the generality of those decisions. The law that evolves is bound to—rather than insensitive to—the facts that give rise to it.

2. *Facts and Statutory Interpretation*

Common-law courts can be responsive to facts even when interpreting statutes—as *Avery* demonstrates because the criminal law interpreted in *Avery* was partly statutory. As a more general example, consider Hart’s classic “no vehicle may be taken into the park” sample statute.¹⁵⁴ The meaning of the word “vehicle” can evolve in light of new facts that come before courts, much as common-law doctrine does. The court might first say that automobiles are covered by the statute, and even if the language it uses in doing so is broad (e.g., “The statute clearly applies to all devices that convey people through the park”), it might later decide that wheelchairs or ambulances are sensibly excluded from the statute’s force, observing that neither the statute nor the court’s prior language was meant to be absolute or to rule out those exceptions. If a court needs to decide whether a battery-powered scooter is a “vehicle,” the decision the court reaches is dependent on the fact that the case involved a scooter. The decision about scooters may inform future decisions on whether skateboards, shopping carts, or contraptions as yet unimagined are “vehicles” for the purposes of the statute, but the original decision does not foreclose (even for a court that wishes to follow precedent rather than overrule it) contrary decisions about vehicles that relevantly differ from the one originally under consideration.¹⁵⁵

But not all statutes work this way. In many cases, announcements of interpretations of statutes cannot be limited by the later recognition that they neglected to consider relevant facts. This is because not all statutes call for determinations about the *scope*, or *in-*

153. *Avery*, 38 P.3d at 6.

154. H.L.A. HART, *THE CONCEPT OF LAW* 128-29 (2d ed. 1994).

155. Cf. generally William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1401-02 (1988) (“[T]he development of statutory law is in many ways similar to the development of common law. Both are bounded, and both proceed within those bounds in a trial-and-error fashion.”).

clusiveness, of a term (like “vehicle”).¹⁵⁶ Instead, many are ambiguous about procedural matters (like a limitations period) that govern many potential parties identically¹⁵⁷ or about whether a set of people whose scope is undisputed has a particular right¹⁵⁸—or, more generally, about the answer to some yes-or-no question that simply cannot be gradually refined. As a general matter, ambiguities in a statute’s syntax, rather than its semantics, tend to raise problems that have little to do with the facts of particular cases. Whether the word “and” is meant to be conjunctive or disjunctive,¹⁵⁹ what words a particular adjective modifies,¹⁶⁰ and similar questions about a statute’s linguistic structure usually have no relationship to specific facts.

When a legal question can be raised even by the least significant or most unusual facts, there is no assurance that the court will hear good arguments about the merits of various potential answers or have a fair chance to see how its decisions will affect litigants. If the legal question is one whose answer is not bound to facts, the court runs the risk of operating essentially in the dark; it is asked to set precedent in a manner beyond its ordinary common-law reasoning, and the result can be a precedential rule that is very broad and that has no relationship to particular facts.¹⁶¹

156. To put this more formally, in a statute that prohibits all “vehicles” from a park, the ambiguity about the meaning of “vehicle” concerns what members to include in a relevant set of “vehicles.” Decisions about what particular items are inside or outside a set can be made gradually: set *V* might first be said to include subset *A*, then revised to include *A'* rather than *A*, then be said to include item *B* but not to include item *C*, then be said to include item *C'*, and so forth.

157. See, e.g., *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Ut.*, 472 F.3d 702, 722-23 (10th Cir. 2006) (interpreting a statute of limitations with a period of limitations dependent on whether a relator who sues on behalf of the federal government under the False Claims Act is considered an “official of the United States”).

158. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (holding that the Family Educational Rights and Privacy Act does not confer enforceable rights on individuals).

159. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 46-49 (1993).

160. See *id.* at 33-38.

161. Although fact-unbound precedents are particularly likely in cases where courts interpret statutory syntax, it is not just statutory construction that raises the possibility of fact-unbound decisions. If common-law courts abstract too much from facts and come to see their role as choosing among prefabricated rules—as they might do in picking a general rule from among abstracted “majority” and “minority” rules already recognized by other jurisdictions and perhaps “codified” by Restatements of the Law—it is possible that the law they create will be difficult to tie to particular facts.

Ordinarily, of course, there is nothing problematic in looking to treatises, Restatements, and other courts in fashioning rules to decide cases. The problem arises only when courts manifest an intent to adopt broad rules, stated and applied without fact-specific context. Even then, later courts can use the facts of the case in which an earlier court adopted a broad rule to clarify the court’s intent in adopting that rule. My observation is just that as laws are applied more mechanically, it becomes more difficult to tie them to the facts of particular cases.

B. Reducing the Impact of Fact-Unbound Precedents

It is important not to overstate the danger of fact-unbound decisions: announcements by courts that cannot be limited by a factual context can still potentially be overruled by later courts or overturned by the legislature that enacted relevant statutes in the first place. Precedent does not determine the law forever.¹⁶² Nonetheless, in practice, overruling and the passage of new statutes is often difficult,¹⁶³ and precedent often binds lower courts. Moreover, parties may change their behavior as a result of the law that courts announce, so it can be inefficient or unfair for an undesirable precedent to be issued, even temporarily.

Of course, courts may well be satisfied that one argument about a statute's meaning ought to prevail over another. In that case, there is less of a problem in the court's ruling that the statute means what it thinks the statute means. But at least some of the time, interpreting statutes poses very difficult questions because the opposing arguments are nearly in equipoise—or, to put it differently, because the meaning of a statute is truly ambiguous.¹⁶⁴

It is to those difficult cases that my discussion is primarily directed. In those cases, it is worthwhile to avoid issuing a fact-unbound decision until a court is satisfied that one party's interpretation is, in a lasting sense, better than the other's.

1. A Maxim to Avoid Unnecessary Statutory Interpretation (in Fact-Unbound Cases)

The easiest way for courts to avoid deciding the meanings of fact-unbound statutes is simply for them not to do so if they can resolve a dispute on other grounds. Courts routinely avoid particular questions when possible—the most familiar example being that courts avoid constitutional questions if they have alternative grounds for deciding a case.¹⁶⁵

162. See generally EISENBERG, *supra* note 1, at 104-45 (discussing overruling).

163. See *supra* text accompanying note 34.

164. See, e.g., *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 725 (9th Cir. 2003) ("As is true of the operative text, Congress' statements of intent in enacting IGRA, and IGRA's legislative history, leave us in equipoise between the parties' competing interpretations of the statute. Both Plaintiffs and Defendants find support for their respective positions, but no party has directed our attention to, nor can we find, any statement of intent or legislative history that clearly demonstrates that Congress even considered the question before us.").

165. *Morse v. Frederick*, 127 S. Ct. 2618, 2640 (2007) (Breyer, J., concurring and dissenting) ("In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents . . ."); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); Ashwander

Common-law courts should similarly avoid issuing announcements of law that are not bound to facts if they can avoid doing so. For instance, in a case that can be decided either on common-law grounds or by interpreting the syntax of a statute, a common-law court should—all else being equal—choose the former over the latter.

Indeed, at least in terms of the precedents they create, a practice of avoiding some kinds of statutory interpretation is likely even more justified than the practice of avoiding constitutional questions. This is because precedent on questions of statutory interpretation is generally taken to be even stronger than constitutional precedent.¹⁶⁶ Of course, there may be other reasons to avoid constitutional questions; if nothing else, it may be prudent for courts to avoid conflicts with legislatures when possible. But in terms of precedent alone, a bad statutory ruling may do more harm than a bad constitutional ruling because of the strength of the precedent it is imagined to create.

2. *A Refusal to Decide Questions of Law*

Even when there is no clear or even justifiable way to decide between alternative constructions of a statute, courts see themselves as obliged to do so when the case before them would have different outcomes depending on which construction the court adopts. But this requirement is not foreordained, except by a conceptualistic notion of courts' functions. Practically speaking, courts have other options.

In particular, a court is able to say to a party, "You have not convinced us that the statute means what you say it means," as if the party had a burden to make a persuasive argument about the statute's meaning. Courts have no problem saying in some contexts that a party has not proven that a particular text means what the party insists that it means,¹⁶⁷ but they neglect this possibility for statutes.

v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). State courts follow a similar practice. *See, e.g., Santa Clara County Local Transp. Auth. v. Guadino*, 902 P.2d 225, 230 (Cal. 1995) ("[T]his Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case. That principle is itself an application of the larger concept of judicial self-restraint, succinctly stated in the rule that we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us." (citations omitted) (internal quotation marks omitted)); *Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) ("Courts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground.").

166. *E.g., Diggins v. Jackson*, 164 P.3d 647, 649 n.4 (Alaska 2007) ("Stare decisis is at its strongest in cases involving the interpretation of statutes."); *Galloway v. Vanderpool*, 69 P.3d 23, 27 (Ariz. 2003) ("[O]ur deference to precedent is strongest when prior decisions construe a statute."); *see also Eskridge, supra* note 155, at 1362 ("Statutory precedents . . . often enjoy a super-strong presumption of correctness.").

167. Consider, for instance, contract interpretation. *See Fid. Nat'l Title Ins. Co. v. Miller*, 264 Cal. Rptr. 17, 22 (Ct. App. 1989) ("When the meaning of the language of a contract

Consider a situation where the plaintiff claims a right under statute X. The defendant disputes that the statute means what the plaintiff says it does. Suppose the case cannot be decided on other grounds. Traditionally, courts see themselves as required to decide the meaning of X. Maybe the court will decide that the statute does not mean quite what either the plaintiff or the defendant have argued it means, but the court feels an obligation to affix *some* meaning to the statute.

There is no reason it must do so. Instead, it can rule that neither party has offered a convincing interpretation of X. As a result, the party relying on it—in this case, the plaintiff—loses on the point for which the party relied on the statute. Such an option does not necessarily favor defendants over plaintiffs: had the defendant relied on a statutory defense, the court could have ruled against it in the same way. In short, under the process of reasoning I am proposing, parties cannot make statutory arguments unless they can convincingly demonstrate that the statute works in their favor.

Introducing this option may look like a reintroduction of the old maxim that statutes in derogation of the common law need to be strictly construed.¹⁶⁸ I do not mean for the suggestion to apply so broadly or to reallocate any significant power from the legislature to the judiciary. Indeed, I expect that in most cases, parties will be able to make convincing arguments about statutes. But when the arguments are nearly in equipoise or when the argument of a party that relies on a statute is underdeveloped, it may well be preferable for courts to say so than to fix the statute's meaning in what amounts to an arbitrary (or at least error-prone) way.

Another objection to this approach is that it is the function of the courts to decide cases and that by refusing to assign meaning to statutes, they are not fulfilling their function. But this argument is simply circular; it assumes that refusing to accept poor statutory arguments represents a failure to decide cases. Of course, under my approach, courts are not failing to decide cases; they are just deciding them differently.

A more significant response is that establishing precedent in statutory cases is useful for all the reasons establishing precedent in general is useful,¹⁶⁹ and failing to supply meaning to statutes leaves the law too ambiguous. But under my approach, courts do not fail to generate rules that are helpful to future litigants. For instance, there

is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, the question of its meaning is one of fact." (emphasis omitted) (citations omitted) (internal quotation marks omitted)).

168. See ESKRIDGE ET AL., *supra* note 34, at 920-21.

169. See *supra* Part II.D.

would likely end up being useful precedent about what sorts of statutory arguments are sufficient—when particular textual and historical arguments are sufficient and when they are not, and so forth. Indeed, introducing the option I have suggested could conceivably help normalize the way courts address statutory interpretation by encouraging them to consider the circumstances under which it is provident to interpret statutory language in the first place. By focusing attention on what precisely is necessary for a statutory argument to be convincing, we may well end up with better statutory-interpretation precedent.

It would not be hard to put my proposal into operation. Courts already routinely refuse to consider questions that are inadequately raised and briefed.¹⁷⁰ What I have proposed is essentially an extension of that principle: that arguments insufficient to set statutory meaning should not necessarily set substantive law.

IV. CONCLUSION

Interpreting court opinions in all their variety is not a narrow endeavor. Case interpretation has not been made more accurate or more appropriately constraining of judicial discretion by the historical lip service paid to the formal separation of holdings and dicta, based on such criteria as a statement's logical necessity to an opinion's conclusion.

This Article has argued for a general interpretive approach that aims primarily to determine the intent of a case's legal announcements. Statements in cases might have broad meaning. They need to be limited by understanding the factual and argumentative context that gave rise to them, but not by formal features that may be incidental to their intended meaning. Cases, like other documents, ordinarily mean more than formal approaches suggest. Efforts to formalize the informal ordinarily fail—or, as the computer scientist Alan Perlis once said, "One can't proceed from the informal to the formal by formal means."¹⁷¹ Even if a court must determine the literal boundaries of precedent—the specific constraints imposed on it by its role in a hierarchy of courts and by other courts' prior decisions—it will miss the mark if it makes this determination by asking only formal questions.

Given the importance of a sensitivity to facts and limitations in viewpoint, this Article has also demonstrated the dangers of prece-

170. *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006) ("Inadequately briefed issues are deemed abandoned." (citations omitted)); *In re Jeffrey C.*, 802 A.2d 772, 777 n.5 (Conn. 2002) ("Claims on appeal that are inadequately briefed are deemed abandoned." (quoting *State v. Salvatore*, 749 A.2d 71, 74 (Conn. App. Ct. 2000))).

171. Alan Perlis, *Epigrams in Programming*, 17 ACM SIGPLAN NOTICES (1982).

dents that cannot be bound sensibly to facts. The paradigmatic precedent of this sort is the interpretation of a syntactic ambiguity in a statute. These ambiguities may well eventually need to be decided, but courts should not act as if they are under a duty to resolve such questions merely because a particular case implicates them. Instead, courts might more appropriately rule that parties' arguments are insufficient to persuade the court of one meaning versus another; in that case, the party relying on the statute loses, but a decision about the statute is postponed until the court is confident about its meaning.

This Article has also aimed to argue, somewhat more implicitly, for more imagination and less reliance on tradition in addressing legal puzzles. The difficulties in distinguishing holdings from dicta do not come from an incomplete or insufficiently elaborate series of rules about the distinction. Instead, they come from problems with imagining the endeavor as logical or algorithmic in the first place. Interpreting cases, like the development of common law more generally, is a venture sensitive to a variety of concerns and susceptible to a variety of methodologies. It does not turn on whether a single, particular goal—like preventing courts from holding too much power or speaking too carelessly—is achieved.

